K. Marriott (J.)

PLAN

OF A

CODE of LAWS

FOR THE

PROVINCE of QUEBEC;

REPORTED

By the ADVOCATE-GENERAL.

LONDON,

MDCCLXXIV.

BRITISH MUSEUM

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TO THE

KING's

MOST EXCELLENT MAJESTY.

May it pleaſe your Majeſty,

WHEREAS your Majeſty was pleaſed, by your order in council of the 14th of June, 1771, to direct *that ſeveral reports and papers relative to the laws and courts of judicature of Quebec, and the preſent defective mode of government in that province, ſhould be referred to your Majeſty's advocate, attorney, and ſolicitor-general to conſider the ſame; to take to our aſſiſtance other perſons, as we ſhall think fit, for the purpoſe of giving informations, and to prepare a general plan of civil and*

 criminal

criminal law for the ſaid province: and by a farther order, dated 31ſt July, 1772, reciting the former order, your Majeſty was pleaſed to direct, *that the advocate, attorney, and ſolicitor-general ſhould make a ſeparate report thereupon to your Majeſty in council, with all convenient ſpeed.* In moſt humble and dutiful obedience to your Majeſty's commands, I have the honour to report, that I have peruſed and conſidered attentively the papers referred, and have obtained ſeveral very uſeful informations.

It is with the utmoſt diffidence I now venture to lay before your Majeſty in council the reſult of the reflections which have ariſen in my mind upon this ſubject: perplexed as it is, and ſo very extenſive, both in its matter and in its conſequences, to your Majeſty, and your government, it would be full of danger to lay down any opinions (not only of what the law is, at large, but what the law ought to be; which

which is the great queſtion referred) too poſitively, in relation to a country ſo remote from home, and to a people, their laws, and cuſtoms, with which your Majeſty's ſubjects here are ſo little acquainted; I cannot, therefore, offer theſe thoughts otherwiſe than merely problematically, and as in deliberation, with ſubmiſſion to ſuperior wiſdom; and I ſhall readily accede to any better reaſonings which may be ſet forth in any other report of the law ſervants of your Majeſty, and in which we might unite.

It is obſervable, that the ſeveral reports hitherto made and referred to us, do not agree in opinion; but ſo far as they do not oppoſe each other in matter of fact, ſo far we may venture to try to frame ſome ſort of opinion on the ground of thoſe facts which are laid before us.

Notwithſtanding that there ever has been, among men of reflection, a great va-

riety of ſentiments upon the ſubject of general legiſlation, and that ſuch ſubjects require the life of a Plato or a Monteſquieu to diſcuſs, and the experience of ages to confirm them, it ſeems to be nearly certain, upon the ordinary experience of mankind (an obſervation very neceſſary and applicable to the progreſſive ſtate of Canada) that wants make manners, and that manners make laws, interpret and controul them in every age and in every government: on the other hand, that laws, in a certain degree, can change the manners of a people, is not to be doubted; becauſe their manners alter with the increaſe and circulation of property, on which the laws have a viſible influence: that in a ſtate of ſociety, where the numbers are few, the wants ſimple, and the property free from the intricacies of commerce, the laws of that ſociety alſo are few and ſimple. The government of a people in ſuch a ſtate repreſents the government of a private family. It is therefore impoſſible to form a general

code

code of civil and criminal law for any people, without its being ſubject to change in the progreſs of civil ſociety; nor can it be effective without its being adapted to the immediate wants of the people, and not inconſiſtent with the tone of their manners: but it is clearly the intereſt of the governing power, for its own preſervation, to watch every change of circumſtances, to follow expediencies as they ariſe, and to model its laws according to the poſition of the ſubject, and the views of that leading policy which is the wiſdom of ſtates, and the ſpirit of legiſlation.

Father Charlevoix*, in ſpeaking of the adminiſtration of juſtice in Canada, in 1663, bewails *the time when arbitrations were no longer deciſive, dictated by good ſenſe and the laws of nature; that it was a ſingular reflection, and humbling for mankind, that the precautions which a wiſe and great*

* Lib. viii. p. 370, 371.

prince thought proper to take to baniſh fraud, and eſtabliſh juſtice, by a new code for the colony, were the encreaſe of the one and the weakening of the other. The truth is, the colony was changed, and the laws followed.

In forming the preliminary propoſitions, in deliberation, to ſerve as a baſis of a code of laws for the province of Canada, it muſt be taken for granted, as a firſt and clear poſition, that the great and ſudden change of the political and relative circumſtances of the country of Canada makes a farther change of its laws abſolutely neceſſary. It is not an *ideal neceſſity* which I mean, nor the hope of *attaining* any *perfection which* may *exiſt in ſpeculation* only, but it is a neceſſity in fact. The laws and people of Canada are already changed; nor can a previous queſtion * be ſuppoſed of the political expediency. After the re-

* Report of the attorney-general.

preſentations

preſentations of the board of trade in the ſtrongeſt terms, the reports of the governor, chief juſtice, attorney-general of the province, and correſpondence with the ſecretary of ſtate, annexed in the papers referred; and after your Majeſty's order in council hath declared the neceſſity of a new ſyſtem, by ſetting forth, that *the preſent mode of government in the province is defective, and commanding your Majeſty's law ſervants to prepare a general code of law for the ſame, and to call upon all perſons we may think fit for information*; ſuch an ample reference precludes all brevity and reſerve, and lays your Majeſty's law ſervants, in my conception, under an indiſpenſible obligation, however painful, to enter into every poſſible conſideration upon a large ſcale, and *to bring the whole ſubject in one proſpect before your Majeſty*, that your Majeſty, in your great wiſdom, may weigh upon the moſt extenſive informations the grounds of ſome probable ſyſtem. This latitude is the more neceſſary, becauſe, if

haſty and ill digeſted regulations ſhould be adopted, upon any miſtaken notions of men and things, the evils already felt by your Majeſty's government will increaſe beyond the power of a remedy.

The relative poſition of the colony in its actual and poſſible views, being well conſidered, and all facts being well ſtated and eſtabliſhed, the reaſonings will eaſily follow.

To know what Canada wants, it is very proper to conſider the relation in which it once ſtood to France, and the relation in which it now ſtands with reſpect to Great Britain. This colony was ſettled with views of policy and commerce, by a miſſion of Jeſuits only, upon pretence of religion, and ſupported in oppoſition to the early claims of the Britiſh crown, as it was natural to a military government, upon military principles. On a view of the civil eſtabliſhment of this colony in its

infancy

infancy and progreſs, which appears from a peruſal of the French commiſſions *, nothing can be more ſimple, or formed with greater latitude than the general and indefinite powers granted to the French officers, to whom it was entruſted. The whole government, in its original ſtate, ſeems to have been left to the influence which military force † has over the bodies, and which a ſyſtem of religion, dazzling in its ceremonies, and operating forcibly on the imagination, has naturally over the minds of men ‡, whoſe employments and wants leave little time for reflection. The common law or cuſtom of Paris, was to be their rule, by the edict of Lewis XIV.

* Vide Creation du conſeil ſouverain de Quebec, 1663.

† Hiſtoire philoſophique et politique des etabliſſemens et du commerce des Européens dans les deux Indes, tom. vi. p. 142.

Tous les colons y devoient ſans exception une obeiſſance aveugle à une autorité purement militaire.

‡ Ibid. p. 157. La neceſſité rendit ſoldats tous les Canadiens.

To

To this general ſyſtem have been added a number of royal edicts, regulations of the ſuperior council, ordinances of intendants, &c. which form the law peculiar to the province *; and although it appears upon the authority of Canadian lawyers, that many parts of the law of the cuſtom of Paris have not at any time been executed in the colony; yet the ſtate of the colony has been the only reaſon of it; and that no caſes have yet ariſen as objects of thoſe parts of the law of the cuſtom of Paris which have not been executed.

In the condition deſcribed, the colony of Canada at the peace of Verſailles †, was ceded to the crown of Great Britain,

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* La coûtume de Paris modifiée par des combinaiſons locales forma le code de ſes loix. Ibid. 146.

† Article IV. Sa M. tres chrêtienne cede et tranſporte le tout au dit roi, et à la couronne de la Grande Bretagne, et cela de la manière et dans la forme la plus ample, ſans reſtriction.

abſolutely,

abſolutely, with no reſtriction but ſuch as regarded the preſervation of private property, or had a view to certain modes of religious worſhip, or rituals, in caſe they were permitted by the laws of the country, which now became ſovereign. One hundred thouſand ſubjects *in this ample manner* (to uſe the words of the treaty) transferred from one ſort of government to another, totally different in manners, languages, laws, and religion, muſt neceſſarily ſuffer a violent alteration.

It is very obſervable, that in the XLIId article of the capitulation for Montreal and Canada, the demand was, *that the Canadians ſhall be governed according to the cuſtom of Paris, and the laws and uſages eſtabliſhed for that country.* This is neither granted nor refuſed, but *reſerved.* The anſwer is, "*they become your Majeſty's ſubjects.* The conſequence is, their laws are liable to be changed. But until the ſyſtem of laws of the ancient inhabitants ſhould be

be repealed by the authority of the new ſovereign power, their old ſyſtem was underſtood by many to be in full force upon them. This is laid down, as *a moſt certain maxim of the common law*, by Mr. Yorke and Mr. De Grey, in their report; by which I ſuppoſe they meant the law of nations. That doctrine is laid down *as the common law* by Lord Coke, in Calvin's caſe. But the common law of England has nothing to do with the queſtion; it is a matter of the jus gentium, and it depends upon the ſilence and preſumed indulgence of a new ſovereign power, as well as upon any acts whereby the ſovereign's pleaſure is made publicly known. There is no occaſion to cite paſſages of Grotius *, or Puffendorff, or any other German or Dutch writers, to ſhew their opinion of what *is poſſible for the ſovereign power to permit by not abrogating*.

* Report of the attorney-general.

But

But much more difficulty occurred (and it was increaſed by the ſteps taken by the Britiſh government) upon the queſtion, *whether the laws, civil and criminal, of the ancient inhabitants, became binding upon the perſons and properties of Britiſh ſubjects who came over to ſettle in Canada after the conqueſt?* who have been thought to carry out with them, as it has been expreſſed by ſomebody, all the laws of England upon their backs; and who, in a more particular manner, claimed the benefit of your Majeſty's proclamation, ſo far as it was underſtood to be binding, as declarative of the general laws of England, and of your Majeſty's right in conſequence, with the advice of your Majeſty's privy-council, to make laws for any conquered country ceded to the crown, exerciſed by your Majeſty in this inſtance, in the ſame analogy as in royal grants or charters, heretofore of any unſettled lands and territories belonging to the crown, acquired by occupancy of the ſubject; the conditions

of

of which grants have been the result of the royal pleasure, having regard to the fundamental laws of England.

The fact appears to be, that a proclamation has been issued by your Majesty, with the advice of your privy-council, so long ago as the 7th of October 1763; setting forth, that *in the interim, until a provincial assembly could be called, all persons inhabiting the said colony may confide in your Majesty's royal protection for the enjoyment of the benefit of the laws of the realm of England; and for that purpose your Majesty had given power to the governors of the said colony, to erect, with the advice of their councils, courts of judicature and public justice.*

As the commission * of the governor of Quebec, is almost in every article a direct copy of the commission of the governor of

* Vide printed Collection, p. 93, 102, 239, 250.

New

New York in 1754, and of the commiſſions of the governors of the reſt of your Majeſty's colonies, modelled doubtleſs upon thoſe granted upon their firſt ſettlement; ſo it ſhould ſeem as if this proclamation had been copied inadvertently, and in the hurry of office, from ſome former proclamation relative to Nova Scotia, or ſome other *unſettled* Britiſh colony, inviting perſons to emigrate thither from the mother-country; and that the reflection never entered the thoughts of the drawers up of this proclamation, that Canada was a conquered province, full of inhabitants, and already in the poſſeſſion of a legal eſtabliſhment. In conſequence of this proclamation and commiſſion, courts of judicature were ſet up, and the judges were directed to follow the laws and cuſtoms of England.

In a report * made April 1766, by the then attorney and ſolicitor-general, Mr.

* Vide Incloſure, p. 166.

Yorke,

Yorke and Mr. De Grey, it was laboured, that this proclamation was only meant *to be introductive of ſelect parts of the laws of England, and not of the whole body of laws; and that the criminal laws of England, and of perſonal wrongs, were almoſt the only laws that came under the deſcription of the words* enjoyment of the benefit of the laws of England; *and that the laws of England relative to deſcent, alienation, ſettlement, and incumbrances of lands, and the diſtribution of perſonal property in caſes of inteſtacy, and all the beneficial incidents to real eſtate, in poſſeſſion or expectancy, were not comprehended under the proclamation.*

The proclamation iſſued upon the 7th of October 1763. The commiſſion of the governor was ſubſequent to the proclamation; the bill not being ſigned by the attorney-general for the commiſſion by letters patent till 22d of October; and on the 14th November 1763, the privy-council

council made an order for interlineations of ſome neceſſary words. Indeed I am diſpoſed to think, that the proclamation, ſingly conſidered, and of itſelf, *without other acts of government which followed it*, did not introduce abſolutely the law of England, in the whole of its ſyſtem, by general words; becauſe it might poſſibly bear ſome ſort of diſtinction, as taken above, between caſes civil and criminal: and it might alſo bear the diſtinction of new, and the old ſubjects, who were the emigrants from home; the former, as governable by their own ancient uſages; the latter, as bearing the privileges of Engliſhmen upon their backs. It might be ſaid, the proclamation was meant for the new ſettlers, and for the new grantees, and related to *the yet unoccupied lands* of the province, and extended no farther.

But theſe diſtinctions were under a farther difficulty from other acts of govern-

ment: the actual eſtabliſhment of the courts of juſtice, of the king's bench, and common-pleas, with commiſſions and titles ſimilar to thoſe of the judges and courts of Weſtminſter Hall, and with expreſs inſtructions to follow the Engliſh laws and cuſtoms, did of neceſſity, and ipſo facto, introduce all the modes of judicial proceeding according to the laws of England; although with this modification, *ſo far as they could be put in practice under ſuch circumſtances*; and did alſo ſtrongly tend to introduce gradually the whole ſyſtem of Engliſh laws, and did occaſion a ſtrong preſumption in the minds of all men, that it was then actually introduced, or meant to be introduced as ſoon as poſſible.

The two ordinances of the 17th of September 1764, and of 6th of November 1764, tranſmitted home to the king in council, *and never diſallowed*, are very ſtrong in favour of this idea, although the firſt

firſt contains ſome ſaving clauſes, viz. *that the judges in the court of common-pleas are to determine agreeably to equity, having regard nevertheleſs to the laws of England, as far as the circumſtances and preſent ſituation of things will admit, until ſuch time as proper ordinances for the information of the people can be eſtabliſhed by the governor and council, agreeable to the laws of England. That tenures in reſpect to grants prior to the ceſſion by treaty, and the rights of inheritance as practiſed before that period, ſhall remain the ſame till the* 10*th Auguſt* 1765, *unleſs altered by ſome declared and poſitive law, with a ſalvo of his majeſty's rights.* The conſequence after the expiration of this date is obvious, that the rights of inheritance and tenures would be changed to the laws of England, ſo far as this ordinance and declaration could legally change them.

With reſpect to the chief juſtice, as a judge of appeal, the difficulty put upon

him by his commiſſion, to decide by the laws of England, was very great; and it could only be avoided by his conſidering himſelf as a judge in the ſecond inſtance, to examine the deciſions of the inferior court, by the ſame rules as they formed their judgments; agreeably to the latitude expreſſed. It is to be obſerved, that the chief juſtice of the king's bench has no authority in his commiſſion to act as a judge of appeal, but he derives it only from the ordinance of the governor, of the 17th September 1764. It is obſervable, *that the governor is limited to the inſtructions annexed to his commiſſion, and to ſuch as ſhall be hereafter given him under your Majeſty's ſignet and ſign manual, or by order of council, and conformable to ſuch reaſonable laws and ſtatutes as ſhall be made and agreed upon by him, with the advice and conſent of the ſaid council and aſſembly.*

The form of French government (ſay the lords commiſſioners of trade, in their report

port to the committee of council, July 10th, 1769*), *though not entirely aboliſhed by thoſe royal declarations, was thus in many parts materially altered, and made to correſpond with that form of government which has been eſtabliſhed in your Majeſty's other American dominions. The reſtrictions in the commiſſion ariſing from the teſt act of the 25th Charles IId, prevented the meaſure of an aſſembly being executed in a colony where all the principal old inhabitants were of the Romiſh religion. Many conſtitutional ſervices were unprovided for in the commiſſion and inſtructions; and what is worſt of all, it has ſince been found neceſſary that ſeveral ordinances, in matters of local regulations, and internal oeconomy, made by the governor and council, ſhould be diſallowed by your Majeſty; upon this conſideration* (as the board of trade ſtate it), *that they were made without a due authority to enact them.*

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* Vide Incloſure, p. 9.

The effect which the taking of this ground of a want of due authority, muſt have upon the opinion of the inhabitants, and their reſpect for government, and the queſtion of legality, with reſpect to every other ordinance of the ſame ſort, is but too obvious. A grand jury in Quebec, with more zeal in the object, than judgment in purſuing the means, preſent the incapacitation of the Romiſh religion; to prevent jurors of that religion being impanelled in caſes of life and death; and to controul the meaſures taken by the governor, general Murray, in conſequence of the legiſlative powers lodged together in a military perſon and his council, and which produced the diſſatisfactory ordinance of 17th September 1763; great part of which has been repealed by another ordinance, as well as many other local regulations which have been diſallowed by your Majeſty in council.

The confuſion which exiſted under theſe circumſtances does exiſt to this moment. But the whole confuſion reſults not only from the new legal arrangements, but it ſeems to be originally exiſting as the natural effects of a conqueſt.—The confuſion is complained of more eaſily than it can be remedied. Every new mode is conſidered as a hardſhip by the old inhabitants, and ſo might they equally complain of the conqueſt. Their minds naturally revert to their ancient uſages, and *their wiſhes return to their ancient government.* It is no reproach to them; they muſt feel as men: and to men every political change which brings an uncertainty of rights, and of the mode of purſuing them, is of neceſſity painful.

It is ſtated, that in the courts of common-pleas, the proceedings are drawn up in any form or ſtyle that the parties think proper; in French or in Engliſh, as the attorneys happen to be Canadian or Engliſh

liſh born ſubjects; and commonly in the French language, as the practiſers are chiefly Canadians; that the old inhabitants diſtribute effects of perſons deceaſed in caſe of inteſtacy, viz. the ſhare of widow and children, and divide their lands, according to their former French law; that the new Engliſh ſettlers follow the Engliſh rules of the ſtatute law in caſes of diſtribution; that the old inhabitants contract, convey, and mortgage their landed property, according to their old mode of conveyancing, notwithſtanding the ordinance of the 17th September 1764, which makes the French laws, regarding lands, expire after a limited period; that the new Engliſh ſettlers uſe the Engliſh mode, and the ſame eſtates have ſometimes paſſed through the two different modes of transfer. It is to be conceived in the latter caſe, that no great harm can ariſe if they are but conveyed bona fide. But as the Engliſh ſhall intermarry more and more with the Canadians, ſome difficulties

may

may ariſe as to the diſtribution of the effects of inteſtates, and the manner of dividing immoveable inheritances, and taking by deſcent in right of primogeniture, becauſe the laws of France and England differ exceedingly in theſe particulars; and the Engliſh blood may claim the protection of the laws of England, againſt the laws of France. But this difficulty may poſſibly be obviated by the method hereafter propoſed.

It is ſtated by Mr. attorney-general Mazeres, that in the civil proceedings carried on in the new ſuperior court of king's bench, the forms of all actions, the ſtyle of the proceedings, the method of trial, the rules of taking evidence, are ſuch as are preſcribed by the Engliſh law, and are univerſally known by the Canadians to be ſo. In the courts of common-pleas, there is much more of the face and language of the French law, for the pleadings are drawn up in any form and ſtyle which

which the parties or their advocates think proper, ſometimes in the French, and ſometimes in the Engliſh language, as the attornies who prepare them happen to be Canadians or Engliſhmen; but they are moſt frequently in the French language, the buſineſs of theſe courts of common-pleas being chiefly managed by the Canadian procurators or attornies. Juſtices of peace are not very reſpectable in the eyes of the Canadians; ſheriffs and bailiffs are alſo officers very unlike to the military conſervators of the peace, and to the executive powers to which the Canadians have been accuſtomed. The arreſt of body in the firſt inſtance in civil ſuits was held at firſt by the Canadians to be an unneceſſary hardſhip and reſtraint, and to be inconſiſtent with their notions of honour, and diſgraceful to the perſon arreſted; the event of the ſuit in his favour was not thought a ſufficient reparation for the inſult; but the French notions of honour have, it ſeems, now given way to convenience, and

the

the inhabitants are ſaid to be very ready at uſing arreſts againſt each other. On the other hand, ſo much indulgence to the perſons of creditors, as is allowed by the Engliſh laws of bankruptcy, is thought by many of the Britiſh merchants and others to be ill adapted to promote and preſerve credit in the tender ſtate of the commerce of the province; and that it is an encouragement of frauds there, (as no doubt it is in England). On the contrary, the Engliſh laws of bankruptcy are well received by many of the ancient Canadians, as being agreeable to the ſpirit of the French laws in caſes of *deconfiture* or inſolvency. It is agreed on all hands, in criminal proceedings, *that the Canadians do as well as Engliſh univerſally underſtand the criminal laws of England to be in full force; that no other are ever mentioned or thought of; and that the Canadians ſeem to be very well ſatisfied with them.*

This repreſentation of Mr. attorney-general Mazeres is confirmed by the appendix

pendix to the report of the 15th September 1769, made by the governor and chief juſtice. It is very full on this head: *that in all criminal caſes, whether capital offences or miſdemeanors, the laws of England have already been adopted, both in the deſcription and quality of the offence, and in the manner of proceeding, to charge, commit, arraign, try, convict, and condemn the offender. And the certainty and lenity of thoſe laws, and the benefits of this part of the Engliſh conſtitution, are generally known to the Canadians, and high in their eſtimation.*

But whatever the criminal law of England is in the great lines of treaſon, felony, &c. I conceive it muſt of courſe have taken place in the colony of Canada; and that no other ſyſtem of criminal laws could exiſt there at any inſtant of time after the conqueſt: becauſe this part of diſtributive and executive juſtice is ſo inherent in dominion, or, in other words, ſo attached to every crown, and is ſo much an immediate

emanation

emanation of every government, that the very inſtant a people fall under the protection and dominion of any other ſtate, the criminal, or what is called the crown law of that ſtate, muſt ipſo facto and immediately operate: it cannot be otherwiſe; for were it otherwiſe there would be no effective ſovereignty on one ſide, and no dependence on the other. The dominant power can exerciſe and execute no laws but thoſe which it knows, and in its own name, and with which its ſervants are converſant: and the ſubjects can obey none but ſuch as ariſe out of the new relation in which they ſtand. The French Canadian lawyers have in general, as I have heard from good authority, the ſame ideas upon this ſubject of the criminal law.

With reſpect to the civil laws, there may be a diſtinction; becauſe a conquered people may be underſtood to be governed by their ancient laws touching their civil property, ſo long as they remain unchanged

changed by any declaration to the contrary of the new ſovereign power; the ſilence of which may be conſtrued to be a tacit confirmation. And theſe civil laws may be binding upon ſuch Britiſh ſubjects who adopt them, *by going to* them of their own free will, and by acquiring property under them; as if they went to Jerſey, Guernſey, Minorca, Scotland, or elſewhere in your Majeſty's dominions. But with reſpect to the criminal laws, I cannot conceive that any native ſubjects of your Majeſty can be tried for life or limb, in any of your Majeſty's dominions, by any other laws than the laws of England, either in matter or manner; or ſuffer the puniſhments annexed to ſuch crimes by the laws of France, ſuch as the torture to exact confeſſion upon circumſtantial evidence, the breaking upon the wheel, the forms of trial by written evidence, perſonal interrogatories, monitories for voluntary witneſſes to appear againſt the priſoners, and the like. Till there is an abſolute ſurrender,

military

military law muſt prevail in every country and ſuperſede the common law; but the moment the new ſovereign is in peaceable poſſeſſion, the merum imperium, or power of the ſword, or the haute-juſtice, as the French civilians call it, to be exerciſed according to common law, takes place; and this power muſt extend to all crimes that concern *the peace and dignity of the crown.* Theſe are mala in ſe, crimes in themſelves, and univerſally known in every nation. Thoſe crimes which ariſe from prohibitions are not known, and therefore they are not governed by penal ſtatutes antecedent to the conqueſt. The mixtum imperium, of perſonal wrongs and civil property, muſt be promulged before the ancient laws are underſtood to be altered.

In theſe views, your Majeſty's proclamation, declarative of the enjoyment of the laws of England, ſeems to have been juſtifiable, and to be rightly underſtood in regard to all your Majeſty's ſubjects in Canada,

Canada, without diſtinction of the places of their birth, ſo far as it relates to the criminal crown law in the greater crimes, ſuch as treaſon and felony; becauſe there the proclamation was meant to convey an actual benefit to the Canadians, by putting an end to both, the military law as well as the French criminal law.

With reſpect to a general aſſembly, if it had been called agreeably to the proclamation, which recites the diſcretionary power given to the governor by his commiſſion to call one *(as ſoon as the circumſtances of the colony will permit, as in the other Britiſh colonies)*, this meaſure would have ſerved to have pointed out the ſpirit and diſpoſitions of the people: but the fact is, an aſſembly, though ſummoned and choſe for all the pariſhes but Quebec, by governor Murray, has never ſat. And it is now agreed, by governor Carlton, the chief juſtice, and Mr. attorney-general Mazeres himſelf, (who had formed a plan

of

of an aſſembly or legiſlative council, as a ſuccedaneum inſtead of an aſſembly) that the meaſure of calling an aſſembly in the preſent circumſtances is by no means neceſſary; that it would be premature, and attended with many great public inconveniencies; as the people in Canada are in general extremely illiterate, and not yet ripe for ſo great and ſudden a ſhare of liberty and legiſlative power. Monſieur Lotbiniere * ſays, that he doubts whether there are more than four or five perſons in a pariſh, in general, who can read. It is apprehended, therefore, that the calling an aſſembly would not have remedied or regulated all the cauſes of complaint, or might even have created new ones. But *that it may be the ſource of factions which have been much experienced in the other colonies*, I think is no good general objection, becauſe all aſſemblies of men naturally fall into diſagreements: it

* Article iv.

is the neceſſary reſult of oppoſite intereſts, or ideas. Different perceptions make men appear like different animals one towards another.

I conceive that no laws *in the detail* can be well formed for any country but by a legiſlative body upon the ſpot; becauſe ſuch a body beſt knows its own wants, and how to find the means, and how to apply them. The colonies of Georgia and Nova Scotia were long drooping under a military government. The extraordinary improvements of them, from the moment they have been permitted to make laws for themſelves, is a concluſive argument of the neceſſity of ſome legiſlative powers to be given to a body repreſentative of the whole colony, with limitations: but it is by no means intended to ſpeak deciſively for or againſt the meaſure of calling an aſſembly: it may be extremely proper to eſtabliſh ſome legiſlative body, with a reaſonable degree of independency,

after

after the outlines of legiſlation ſhall have been firſt drawn by your Majeſty, either in your privy council, or in your great council in parliament; an aſſembly of *ſome ſort* may then be uſeful to carry into execution the details, and to build on the foundations, which ſhall have been laid out by a ſuperior policy. A legiſlative and elective council might poſſibly be the moſt uſeful with a *power of negative in the governor*, provided that the laws, which are to be paſſed in ſuch council, ſhould be only proviſional, although they ſhould happen to paſs without the governor interpoſing his negative voice; but not to operate till they have had your Majeſty's expreſs confirmation, and even afterwards to be always ſubject to revocation at your Majeſty's pleaſure. And I am the more inclined to a legiſlative council, becauſe it ſeems to be conſiſtent with reaſons of policy, to preſerve the great difference which already ſubſiſts between the people of this country and the reſt of your Majeſty's colonies: yet, at the ſame

time, it is neceſſary to make the Canadians forget that they were Frenchmen, and to approximate them more as Britiſh Canadians, to a Britiſh government by a ſyſteme mitoyen, or middle ſyſtem, ſo as to effect, what the chief juſtice calls, *the happy temperament of new and old laws*, to reconcile the engagements of the crown with reſpect to both ſorts of ſubjects, and to anſwer the views of political government; not in that ſort of abſolute uniformity of laws, or religion, which exiſts no where but among the ſmall ſavage tribes of men, and which is not found even in the moſt deſpotic ſtates; becauſe a perfect uniformity cannot exiſt without extirpation of the ſubjects, which in the end muſt weaken or deſtroy the ſovereign power itſelf.

The great lines of union of Canada to the realm of Great Britain is drawn at preſent by virtue of the conqueſt. The aſſimilation to the government of the latter, in its tribunals, is actually effected; an

aſſimilation

aſſimilation of manners will follow ſlowly; but it muſt neceſſarily follow as a natural conſequence of the conqueſt. The military ſpirit of the inhabitants, carried to an exceſs in the late war, has begun to ceaſe: it is very important for England that it ſhould ceaſe. The cultivation of lands, and attention to commerce (unknown bebefore) are encreaſing every day. The back ſettlements extend themſelves; and the inhabitants of New York and Canada are approaching nearer to each other: ſome French families who diſliked the Engliſh proceedings, and many of the firſt Engliſh ſettlers at Quebec, who were ſeveral of them, upon ſpeculation, adventurers from England, Scotland, and Ireland, or factors for conſiderable merchants in London and elſewhere, have retired from the colony; not finding that the advantages of the opening of trade there anſwered the ſanguine expectations of the earlieſt comers, who overſtocked it, or who found a military government in too great a degree of

vigour, for the advantage and ſecurity of commerce; and their place is daily ſupplied by another ſort of men, ſuch as Engliſh officers of the army and navy, and actual merchants. A great* iron foundery has been eſtabliſhed; warehouſes are built; one houſe for diſtilling only has coſt five thouſand pounds; and ſuch great purchaſes of landed property have been made of the

* Hiſtoire philoſophique, tom. 6. p. 152. Une veine plus ſûre encore s'offroit à l'induſtrie. C'étoit l'exploitation des mines de fer ſi communes dans ces contrées. La ſeule qui ait jamais fixé l'attention des Européens eſt près des Trois-Rivieres. On l'a découverte à la ſuperficie de la terre. Il n'en eſt nulle part de plus abondantes, & les meilleures de l'Eſpagne ne ſont pas ſi douces. Un maître de forge, arrivé d'Europe en 1739, augmenta, perfectionna les travaux de cette mine juſqu'alors foibles & mal dirigés. La colonie ne connut plus d'autre fer: on en exporta même quelques eſſais; mais la France ne voulut pas voir que ce fer étoit le plus propre à la fabrique de ſes armes à feu, le ſeul qu'il lui fut même avantageux d'employer. Une politique ſi ſage s'accordoit merveilleuſement avec le deſſein qu'on avoit pris, après bien d'incertitude dés former un établiſſement de Marine en Canada.

native

native Canadians by Engliſhmen, that ſome of the principal ſigniories at this day are in the actual poſſeſſion of the latter. There are about two or three thouſand Britiſh born ſettlers beſides the troops. Every year, with the acceſſion of commerce, in the nature of things, muſt encreaſe their numbers and conſequence, if the laws are well fixed and adminiſtered, and a military government, if poſſible, is avoided or controuled. For notwithſtanding the natural indolence and ignorance of the people and their preſent poverty, notwithſtanding the circumſtances of the pretended difficulties attending the navigation of the river Saint Laurence, at all times, from its rocks and ſhoals, magnified by the inexperience* or policy of the French, and the long time

* The tide runs up as far as Trois-Rivieres: and frigates of war have gone up as high as Montreal, to the great aſtoniſhment of the French, who conſidered the river above Quebec as only navigable by oared veſſels.

it is frozen, for full ſix months*: yet when we conſider the prodigious encreaſe of population, the exceeding fertility of Montreal, the healthineſs of the air, and the vaſt woods of Canada, capable of ſupplying naval ſtores and lumber for the Weſt Indies and for the mother-country. The produce of horned cattle, ſheep, horſes, hogs, wool, corn, hemp, flax, furs, pot-aſh, iron, &c, and the ſituation of the river St. Laurence, ſo adapted for the fiſhery†, and encreaſe of ſeamen, objects little purſued by the French government, totally taken up with military operations, it is reaſonable to think that all theſe circumſtances will, in courſe of

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* The time it is quite free is ſtated by general Carlton to be in May.

† Pêcherie du loup marine. p. 144. ibid. La pêche de la baleine pouvoit donner une ſinguliere activité aux colons, & former un nouvel eſſaim des navigateurs. Le plan de pêcher de la morue ſur les deux rives du fleuve S. Laurent. p. 155. ibid.

time

time, conſpire to make Quebec the Peterſ-burgh * of North America.

It appears from very good authority, that the imports from Great Britain in one year, into this colony, have amounted to two hundred and forty thouſand pounds ſterling, excluſive of the imports from Scotland, Ireland, the Weſt India iſlands, and the other American colonies; and this too, ſoon after the conqueſt; when the complaints and confuſion of a military government were at their higheſt pitch; a magiſtrate and merchant, who brought ten thouſands into the province, mutilated by the ſoldiery; and who burnt their barracks in defiance of an act of parliament,

* Ibid. p. 152, 153. L'extraction de bois des chênes d'une hauteur prodigieuſe, & des pins rouges de toutes les grandeurs, eſt facile par le fleuve S. Laurent. & les innombrables rivieres qu'il reçoit. Ce pays avec quelques ſoins & du travail pouvoit fournir la France entiere des voiles, des cordages, du bray, du gaudron.

by

by which they were erected for the relief of the people; and notwithſtanding many other embarraſſments ariſing to trade, from the condition of a people, among whom the laws were adminiſtered in a ſummary way, and by perſons without legal ideas.

From all the facts ſtated as above, upon the evidence of informations, of too high authority to be doubted, follow two conſequences; that after certain new regulations have been ſubmitted to with patience by his Majeſty's new Canadian ſubjects, for a ſpace of thirteen years, though with ſome ſuch complaining as is natural upon a change of maſters, the foundation which has been laid for an approximation to the manners and government of the new ſovereign country muſt either continue to be built upon, or otherwiſe the whole that has been done muſt be thrown down, and the Canadians *muſt be reſtored in integrum* to all their ancient laws

laws and uſages; a manner of proceeding as inconſiſtent with the progreſſive ſtate of human affairs, as with the policy of any poſſible civil government, which cannot revert, but muſt neceſſarily take up things, and go on the ſtate of exiſting circumſtances at the time it intervenes; for it can as little ſtand ſtill at any given point, as it can decide that the flood of times ſhall go no further. As men move forward, the laws muſt move with them, and every conſtitution of government upon earth, like the ſhores of the ſea from the agitation of the element, is daily loſing or gaining ſomething on one ſide or the other.

From all which propoſitions there ſeem to follow plainly theſe political conſequences; that after your Majeſty's proclamation, commiſſions, and inſtructions, and the eſtabliſhments of courts of juſtice, and ſeveral ordinances which have been iſſued by virtue of that proclamation, it would leſſen, not only in the minds of the Canadians,

dians, but of all Europe, the ideas of the dignity, wiſdom, and authority, of your Majeſty's government, to undo every thing that has been done: that to reſtore the colony to its military principles and ſpirit, would be in conſequence to reſtore it to France.

The views of the French cabinet are evident, by the accounts tranſmitted by governor Carlton of the Canadian born officers who ſerved in the laſt war, who are in a particular manner cantoned in Touraine *, and ſupported by the French government, with an increaſe of pay and all arrears.

With reſpect to a military ſyſtem, nothing can more effectually ſuppreſs a riſing ſpirit of commerce, which alone can make the acquiſition of Canada of any utility to Great Britain. Commerce grows only to perfection in an open ſoil, and in an air that

* Vide Col. Carlton's letter to the Earl of Shelburn. Dated Nov. 25, 1767. Incloſure, Appendix, No. 1. p. 67, 68.

is free; it will ſcarce bear to be regulated: it is like the ſenſitive plant; if touched, it ſhrinks; but if preſſed, it periſhes. I chuſe rather to ſpeak in this figurative manner, than to enter into the detail of the conſequences and inſtances of military powers, exerciſed in this colony at a certain period. It never can be the intereſt of any government, however deſpotic, to oppreſs commerce; it would be like the wild Indian, who cuts down the tree, to gather the fruit.

Hitherto the province * of Canada has been an eſtabliſhment only expenſive and burthenſome to the French government.

* Hiſtoire Philoſophique, ibid. p. 143. Tous les objets ne produiſoient au fix en 1747, qu'un revenue de deux cens ſoixante mille deux cens livres.

Ibid. p. 149. Les deſpenſes annuelles du gouvernment pour le Canada après l'epoque de 1749, n'eurent plus de bornes.

Les huit premiers mois de l'an 1760 couterent treize millions cinque cens mille livres. Des ces ſommes prodigeuſes il étoit du à la paix quatre vingt millions.

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The fur trade was but a ſmall object of attention, in proportion to the political views. The great uſe of the colony was offenſively: as a place of arms, to form the head of a chain of forts, and to harraſs the Britiſh colonies, and, by its poſition and communication with the lakes quite down to the Miſſiſſippi, to command the commerce and force of the whole interior of the vaſt American continent. A circumſtance which varies the political conſiderations and conſequences with reſpect to the arrangements of Canada very greatly from the caſe of Minorca, to which it has been improperly compared, as a rule for the government of it: the relative poſitions are totally different: it might as well be compared to the rock of Gibraltar, or the fort of an African garriſon.

If Canada ſhould be recovered by France in a future period, by the mere want of wiſdom in a Britiſh government, and if France or any other power ſhould obtain

but

but a near equality of force at ſea, the conſequence muſt prove the conqueſt of all our American colonies, or perhaps the eſtabliſhment of a new independent empire, upon a general revolt of all the colonies, of which Canada, by its poſition, would form the head. But now under proper regulations this country may be productive of the greateſt commercial advantages to Great Britain. The Weſt India iſlands, and the Eaſt Indies are the graves of its beſt ſeamen; the northern American navigation and its fiſheries are the nurſeries of them; and Canada may become the ſource of an infinite ſupply to this nation both of men and of naval ſtores.

It is an object of great conſideration to your Majeſty's government, that the returns to Great Britain are all made in raw materials to be manufactured here; and that a conſiderable duty ariſes on the exports.

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The views therefore of the Britiſh government in reſpect to the political uſes to which it means to make Canada ſubſervient, muſt direct the ſpirit of any code of laws, of which it may be judged neceſſary to form the outlines upon the grounds of probability. The additions muſt be left to time, to experiment, and expediencies, as they ſhall ariſe, and to that Providence which holds the ſcale of empires.

But the great queſtion occurs: *By what authority ſhall the laws, neceſſary for the government of this colony, be eſtabliſhed?* It is ſtated, that doubts have ariſen, eſpecially after certain deciſions, concerning the legality of the ordinances iſſued by the governor, with the advice of his council, and without any aſſembly, *as exceeding his commiſſion**. If the ordinances are not legal, then all that has been done by virtue of them muſt be a nullity. Some of them

* Printed collection, p. 25, 96.

have

have already been diſallowed for exceeding the bounds of the commiſſion, which reſtrains the power of the governor and council in matters touching life and limb, and impoſing duties; conſequently very few allowable ordinances can be made under thoſe terms at any time; becauſe few ordinances can be enforced without reſtraints upon the perſon, or without affecting property by public burthens.

If it could be ſuppoſed for a moment, that the crown has not a right at all times to make ſuch ordinances in the perſon of the governor and council, without an aſſembly, (as I conceive it has a right, in a conquered country ſo circumſtanced, and at a certain time to make them) yet I ſhould be inclined to think that all the ordinances hitherto made, and not diſallowed, are legal; or that ſuch ordinances might have had, at leaſt pro tempore, a validity within the province, until there ſhall be an alteration made by ſome act of the whole

united legiſlature of Great Britain, or at leaſt by order of your Majeſty in council, diſallowing them. Until ſuch act or order, the caſe may be conceived to be the ſame (the governor being the repreſentative of your Majeſty by virtue of his commiſſion) as if your Majeſty, at the head of your army in the field, were granting capitulations, or giving orders how to diſpoſe of the new ſubjects de bene eſſe, for the preſervation of their perſons and properties, for the good of the ſtate, which is now intereſted in them, and for maintaining the *peace* and permanency of the acquiſition: all which I conceive to be powers neceſſarily inherent in your Majeſty's crown.

The mode of making laws for the colony of Quebec, and carrying them into execution, is a ſubject upon which many perſons may differ. The higheſt wiſdom only can determine whether it is neceſſary to have the ſanction of parliament for a code of laws, which your Majeſty of right may

may give to this colony in ſome other way. But I humbly apprehend, that an act of parliament may poſſibly ſerve the moſt effectually to juſtify your Majeſty's ſervants, and to fill the minds of the Canadians with greater confidence: it may declare the powers which are inherent in the crown; and by ſo doing, it may ſupport inſtead of diminiſhing them.

There is a point which deſerves the conſideration of your Majeſty's ſervants moſt verſed in the common law of the realm, whether if your Majeſty has by your proclamation, commiſſions and inſtructions, and the ſeveral acts done in conſequence thereof, given to this conquered country any part of the law of England; that law, once ſo introduced, be it more or leſs, can be repealed by your Majeſty's authority alone and without the concurrence of parliament, upon the civil law maxim, *cujus eſt condere ejus eſt abrogare?*

It is alſo to be obſerved, that general Murray is ſaid, upon good authority, to have actually executed his commiſſion with reſpect to convening an aſſembly; that the members were actually choſe, except at Quebec. So that the expectations of the Canadians have been raiſed, and, in their ideas, the honour of government pledged to them for a legiſlative body of their own. In caſe an aſſembly ſhall be hereafter called, in conſequence of an act of parliament, it will effectually take away from a Canadian aſſembly all ground for that pretence, ſet up by ſome aſſemblies in other colonies, of being independent of a Britiſh parliament.

If aſſemblies ſhould be adopted, I cannot omit taking notice of an error in the report and propoſitions of the board of trade of the 10th July, 1769, page 17. They propoſe to admit a number of the new ſubjects into the council. They would enlarge it from twelve members to fifteen,

fifteen; five to be Roman catholic ſubjects, to be exempted from ſubſcribing the declaration againſt tranſubſtantiation, as now required by the commiſſion and inſtructions. But it ſeems to be forgot, that the oaths againſt the power of the pope, and in ſupport of your Majeſty's ſupremacy, required by the ſtatutes, will exclude the Roman catholics. Alſo the manner of wording the plan of an aſſembly, p. 18 and 19, meant, as it is ſaid there, *to correſpond with the plan of the council*, makes the twenty-ſeven members all liable to the oaths of allegiance, ſupremacy, and abjuration, by propoſing *that they ſhall not be obliged to take any other*. The conſequence follows, they are then to take theſe oaths; and fourteen are afterwards required to ſubſcribe the teſt. Now can a Roman catholic, agreeably to the ſtatute of 1 George I. chap. 13, take the oaths which are required to be taken, agreeably to the commiſſion, by the governor and members of the council, aſſembly, &c. viz. *That no foreign prelate or perſon hath, or ought*

to have, any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm? So that this proposition of the board of trade, plainly appears to be inconsistent with its own views in p. 20, that *the assembly should consist of twenty seven, all indiscriminately to take the oaths of allegiance, supremacy, and abjuration; that fourteen will be protestants, viz. who shall take the test act: and the thirteen who take the oaths of allegiance, supremacy, and abjuration, to be probably, as the plan supposes, Roman catholics.* But the oath of supremacy renders the latter, in my opinion, impossible. The pope can hardly dispense with the test of the sacrament; but he cannot in common sense dispense with oaths, and declarations, and subscriptions, against his own supremacy, as claiming to be sovereign pontiff of the whole Christian world, and, in the power of the triple crown, to bind and absolve all persons and things in heaven above, on

the earth beneath, and in the ſtate of the dead below.

As it is ſtated by the board of trade p. 10. *The teſt is to be ſubſcribed by all perſons having places of truſt, and ſo required by your Majeſty's commiſſion to the governor.* By the teſt act the ſacrament is to be taken by them within the realm of England. Although Canada is united to the crown of Great Britain, and conſequently to the realm, by the terms of ceſſion, yet I underſtand that the ſalvo among the Canadians for the oath of ſupremacy is, *within this realm? Canada is not this realm, in the view of the ſtatute.*

After all, if it ſhould not be thought proper for your Majeſty to give freſh inſtructions, from time to time, to your governor of the province of Quebec, to publiſh freſh ordinances, with the advice and conſent of his council; nor to convene any legiſlative council, or provincial aſſembly, for the purpoſe of reviſing or repeal-

ing the ordinances already made, and of making new laws; but if it ſhould be thought the wiſeſt meaſure to lay the ſtate of the province before parliament, then I ſhould conceive that it will be neceſſary to propoſe ſeveral bills.

Firſt, viz. *A bill for the better regulation of the courts of judicature in the province of Quebec.*

Second, *A bill for declaring the common law already in actual uſe in the ſaid province.*

Third, *A bill for better raiſing and collecting the public revenue.*

Fourth, *A bill for giving leave to his Majeſty's new Roman catholic ſubjects in the ſaid colony, to profeſs the worſhip of their religion according to the rites of the Romiſh church, as far as the laws of Great Britain permit; which were in force antecedent to the definitive treaty of peace, concluded at Paris 10th February 1763; and for the better maintenance of the clergy of the church*

church of England already eſtabliſhed in the ſaid colony.

With reſpect to the firſt, a bill for the better regulation of the courts of judicature in the province of Quebec, I conceive, that the complaint of delays in proceedings of the courts of juſtice is now in great meaſure removed; for by the laſt regulation of the courts of common-pleas, by the ordinance of February * 1770, (which repeals a part of the great ordinance of 17th September 1764) it is directed, that the courts of common-pleas eſtabliſhed with independent juriſdictions at Quebec and Montreal, *ſhall be open to the ſuitors throughout the year, excepting three weeks at ſeed-time, a month at harveſt, and a fortnight at Chriſtmas, and Eaſter, and except during ſuch vacation as ſhall be from time to time appointed by the judges*

* This ordinance, which was not in the papers referred, makes the propoſitions of the ſolicitor-general on this head in great meaſure unneceſſary.

for

for making their reſpective circuits throughout the province, twice in every year; and the judges are authoriſed and directed to iſſue their proceſs, and to execute every other thing touching the adminiſtration of juſtice, without regard to terms or any ſtated periods of time, as limited and appointed by the ordinance of September 1764; which, with reſpect thereto, is annulled. The judges to appoint one day in a week, at their diſcretion, to hear all matters where the cauſe of action ſhall exceed the ſum of twelve pounds, which day ſhould be declared at the riſing of the court, or the next day preceding; and no adjournment ſhall be made for any longer time than one week, upon any pretence or ground whatſoever. Every Friday to be a fixed court-day for matters not exceeding twelve pounds, in which caſe one judge to be ſufficient, the other judge having reaſonable cauſe of abſence. The reſt of the ordinance contains the forms and modes of proceeding, alſo a clauſe,

empower-

empowering perſons, ſpecially commiſſioned by the governor, to hear cauſes where the matter in queſtion ſhall not exceed three pounds; provided that titles to lands ſhall not be drawn into queſtion by their proceedings, and that they obſerve the ſame forms of proceeding, and that they do not ſit upon a Friday, but on ſome other day in every week. It would be very material to ſee what ſort of commiſſions the judges of the common-pleas have, *for they do not appear in any papers referred.* I underſtand them to have been created by governor Murray, by virtue of his diſcretionary power, upon his own ideas. If they are thought proper to be continued, certain regulations muſt be adopted, in regard to limiting their juriſdiction to caſes not beyond a certain value.

The expence of the fees of the new courts is eaſy to be regulated by a table to be ſettled by the judges; and if they are now larger than heretofore, it is no more

more than that the fees of juſtice keep pace with the price of other matters, as corn and all other things, are more dearly purchaſed now than they were in the province before the conqueſt, becauſe there is more commerce, and conſequently more ſpecie circulating in it, which is the repreſentative, or rather the new meaſure of values; ſo that more or leſs ſpecie muſt be put into the oppoſite ſcale againſt all property in the other, juſt as it happens, that more or leſs ſpecie, real, or nominal, or credited, is introduced into intercourſe and commutation. The caſe muſt be the ſame in Canada as it is in every other country; and the uncertainty of the laws, and of the judicial proceedings, has had no ſmall ſhare in increaſing the expence of them.

In the report * of the attorney and ſolicitor-general Yorke, and De Grey, they

* Art. vi. No. 8. of the Appendix to the report of the lords commiſſioners of trade and plantations, relative to the ſtate and condition of the province.

recommend that matters exceeding forty ſhillings, as far as ten pounds, ſhould be determined by proceeding (in the nature of civil bill in Ireland) before the chief juſtice of Quebec, or by proceeding in nature of the ſummary bench actions at Barbadoes. How far the eaſe and cheapneſs of going to law encourage rather than check litigiouſneſs, is pretty obvious; however, the local value of money will deſerve conſideration at all times, in reſpect to the augmentation of eſtabliſhed fees. As a check to litigiouſneſs, and for the promoting quick juſtice, ſome method might be found, ſo as to oblige parties in caſes of debt under a certain value, and in all caſes of cuſtom of merchants, and of mercantile accounts, to name arbitrators, and thoſe arbitrators to name a third if they do not agree; and that the award ſhould be certified into the ſuperior court, and made a rule of it upon record, and ſo carried into execution by it, in the ſame manner as if the matter had had the moſt

ſolemn

ſolemn hearing: for which I cannot refer to a better precedent, than to the act of 9 and 10 William III. c. 15. except that the reference is there left to the will of the parties, and of courſe that act is ſeldom made uſe of, nor is it very natural that the practiſers ſhould recommend it; and therefore I propoſe, that parties, in caſes of certain value, ſhould be obliged to name arbitrators.

As the Engliſh judges may not happen to be expert in the French language and law terms, it may be adviſeable to give to laymen, perſons of good character and underſtanding among the ancient inhabitants of Canada, commiſſions to be aſſeſſors, but not to have voices.

Whether grand juries, or petty juries, ſhall be laid aſide; or whether in criminal; or civil cauſes only; or whether verdicts ſhall be an open majority, or whether all verdicts ſhall be ſpecial in civil caſes, (as the latter

latter is propoſed in the plan in the printed collection of Mr. attorney-general Mazeres) are queſtions of which I am not able to form a perfect judgment, as being partly out of the line of my profeſſion; but it merits a particular conſideration, how far it may be adviſeable and ſafe for your Majeſty's miniſters to propoſe any thing to parliament that greatly deviates from the general fundamental parts of the conſtitution at home, and which, for a long time, have already taken place in the colony, in conſequence of your Majeſty's royal word and authority. The juſtification of your Majeſty's judges, the removing them from every ſuſpicion of partiality, and from the danger of perſonal revenge, is alſo a matter of the higheſt conſequence towards themſelves, their country, your Majeſty, and before God. The peril of diſcretionary powers, is ſufficiently pointed out by that great judge lord Hale, in his Hiſtory of the Pleas of the Crown, page 160, 161, 211, and it merits the greateſt attention from

from thoſe perſons who are called upon to propoſe a legiſlative ſyſtem.

After the evidence of the governor, chief juſtice, and attorney-general of the province, *that juries in criminal cauſes are agreeable to all the Canadians*, any imaginations formed to the contrary, with reſpect to the Canadian lords of manors or nobleſſe, cannot be admitted. The ſtate of the nobleſſe in the province will be more particularly explained, when I come to ſpeak of the convents, under the head of religion; I will only obſerve, in the caſe of trial of a ſeigneur, that other Canadian ſeigneurs would probably be ſome of the jurors, and that *if any of his tradeſmen were of the jury*, they would have an intereſt in preſerving the life of the criminal; as mercantile intereſts have often ſupported the worſt members in a factious ſtate, both in ancient and modern hiſtory, to avoid a probability of loſing their debts. But the ſeigneurs or nobleſſe by virtue of

their

their fiefs, and the officers and nobles by patent, who have ſerved in the French troops, are, the one too inconſequential, and the other too miſerable, in point of property, to merit any diſtinction by trials, or in the nature of the puniſhment: to compare them to Britiſh peers would be to form an argument of ridicule and not of reaſon.

As it appears that the Canadians have had ſo great an objection to arreſts being diſhonourable, and as arreſts create ſo much miſery in a whole family, who become a burthen upon the public, as they prevent every exertion of induſtry, and render the morals of the priſoner much worſe, by confining him in company with the moſt abandoned criminals, it ſeems to me that in a commercial ſtate it may be proper to take away arreſts of body in the firſt inſtance, in civil cauſes under ten pounds; unleſs there is an oath of two ſufficient witneſſes, that the defendant is likely to

withdraw himſelf out of the colony. To arreſt an induſtrious man, when perſonal labour is of ſuch value to the community, is a public loſs, as well as a private one to the perſon who arreſts: it is putting fetters upon that induſtry, the exertion of which only could diſcharge the debt.

If arreſts ſhould be allowed, it ſeems highly neceſſary that impriſonments ſhould be regulated. It would be happy if they were ſo in every part of your Majeſty's dominions. The ſecurity and reformation of priſoners ſhould be the objects of the legiſlature in depriving a ſubject for any time of his liberty: his life, and health, and morals are of public conſequence. The police in Holland, where every priſoner has a ſeparate cell or apartment, is deſerving of imitation; neither their minds nor bodies become there liable to the worſt contagions; and a releaſed priſoner returns back to ſociety a better and more

uſeful

uſeful ſubject than when he entered his cell.

The terms of the ordinance of the 1ſt February, 1770, appear to me inſufficient, in not directing that the ſale of all eſtates in land taken in execution ſhall be made by public auction; nor does it regulate the other conditions of ſale, nor the place where the auction ſhall be: all which being left to the diſcretion of the provoſt-marſhal, as I conceive it, may be extremely injurious to the proprietor; and furniſh perſons with means of procuring the eſtates at a price greatly inferior to their true value. The ordinance only ſettles the manner of giving notice, the time of ſale, and the fees for the publication.

It may be proper to allow all pleadings to be in French or Engliſh in all the courts at the option of the parties indiſcriminately. It ſhould be known in ſuch a country, that parties may plead for themſelves: it would be proper to confirm expreſſedly ſo much

of the proceſs verbal, or rules of practice, in the French courts of the colony of the 7th November, 1668, article 6, as relates to this point; becauſe this public confirmation will obviate the complaint among the Canadians, of the expence of ſuits, and it will pleaſe the inhabitants, without hurting the practitioners; for if the parties can find an abler hand, or can pay him, certainly they will pay him to plead for them: if they cannot, it is but juſtice they ſhould be permitted to tell their own ſtory, and in their own way.

I am profeſſionally convinced of the abſurdity and confuſion which is ever occaſioned when the ſtyle and forms of one ſyſtem of law, or even of one court in the ſame ſyſtem, is applied to the practice of another: the meaſure of proceedings being inconſiſtent with the nature of the principles, or the buſineſs in queſtion, is in many inſtances ſo unequal, that to judge of the law of one country by the rules of proceſs

ceſs of another is, beſides doing injuſtice under an appearance of doing better, a thing as full of abſurdity and ridiculouſneſs, as if a taylor were to take a meaſure of a man's coat by a ſhip's quadrant. The forms and ſtyle of Engliſh writs and pleadings ill agree with the language of the French civil law: it deſerves to be conſidered, how far it may be neceſſary to follow many other parts of the French proceſs, if the French law in civil property is to remain as the common law of the province. I conceive this muſt be left to the knowledge, diſcretion, and experience of the judges; who will have the aid of the bar and the Canadian practitioners: and it may be enacted that no judgment * ſhall be arreſted merely for want of form in civil ſuits. The fact, the demand, and the defence are eaſily reducible to ſimple propoſitions. But in *criminal caſes*, as all the law of England on that head actually

* Vide ſollicitor-general's Report.

now is introduced, the forms of indictment, in *my opinion*, muſt be continued, and ought to be as ſtrict as in England; upon this ground, becauſe the laws of England being dipt in blood, the advantages given to criminals, by the lenity of the proceſs, and the power of pardon in the crown, are the only ballance of the peculiar ſeverity which is manifeſt in the inequality of crimes and puniſhments. The Engliſh laws in their inſtitution ſeem to have been made for the terror of a daring people; the execution of them, for a generous and compaſſionate one. I concur in thinking that there ſhould however be a mitigation of the law of felonies by ſtatute. That no perſon in the province ſhould be capitally convicted for theft or robbery under five pounds, although *that is equal to ten in England*; and that in all felonies intitled to clergy, no perſons ſhall be burnt in the hand, or their goods confiſcated, but the puniſhment to be a fine

or

or impriſonment, at the diſcretion of the court.

As the province derives the leſs advantages from the ſuperior court, although the moſt important, and moſt ably ſupplied, for want of more frequent ſittings, it ſhould be regulated: and the court of King's Bench ſhould be held oftner, and in terms as ſhall be judged moſt for the convenience of the inhabitants, beſides the circuits. For it is ſtated that the court of King's Bench has ſeſſions only three times a year at Quebec, and twice at Montreal: whereas in the time of the French government there were three royal courts, one in each diſtrict of Quebec, Trois-Rivieres, and Montreal, veſted with full power civil and criminal: each court had its judge, and a king's attorney-general for crown proſecutions. They held two courts in every week, except ſix weeks vacation in September and October, and a fortnight at Eaſter, and theſe courts would

even ſit on other days in the week if extraordinary buſineſs required it. From theſe courts there lay an appeal to the ſupreme council of the province, which ſat every week. The expedition and reaſonableneſs of ſuch arrangement for the diſtribution of juſtice is infinitely ſtriking. And it appears not to have been without cauſe that the Canadians have felt and complained of the difference. To make the ſittings of the ſupreme court of King's Bench more regular, it cannot be better than to adopt the ordinance for that purpoſe, which was recommended by the chief juſtice himſelf from the bench to the grand jury of the province, but which did not paſs, becauſe ſome of the Engliſh merchants of that jury, deſirous to delay cauſes of actions for debt in the then low ſtate of commercial credit in the province at that time, did not approve ſo much expedition of judgment; and therefore the Engliſh part of the jury never acquainted the Canadian part, all of whom are now

ſenſible

ſenſible of the utility of the ordinance propoſed, and regret the loſs of it. Mr. attorney-general Mazeres has printed it, Collection, page 71.

In the caſes of appeals the legal value of money deſerves great conſideration. If the plan of three courts, and an appeal to the governor and council, with two of the judges and King's attornies of the other courts, is not adopted, then the appeal, in caſes of four hundred pounds value, might be made directly to your Majeſty, without any other intermediate appeal.

It may be alſo proper to erect, as propoſed in the report of the governor and chief juſtice, a court at Dêtroit, becauſe the ſettlers there, amounting to about ſeven thouſand perſons, are populating very faſt, and extending themſelves, as the people of New York are, towards each other. An objection may be taken to this, that it is not policy to encourage back ſettlements: but

but the queſtion ſeems to be, not whether the population of the interior North America ſhould be encouraged in policy; but the fact is, that there is, and will be population there; and that where population is, the dominant power muſt regulate the ſettlers, or they will regulate themſelves probably to its prejudice. The interior ſettlements certainly are a material ſupply and ſupport, both of men and proviſion, to the exterior on that coaſt, and ſerve equally to take off the produce of the mother-country, and to make returns by the medium of the ſea-ports; but there can be no real diſtinction as to political good between the inhabitants of the maritime line and thoſe of the back ſettlements, for they are much connected in view of national ſtrength and benefit; as the radii of a circle all meet in the ſame common center, and all touch the ſame extreme boundary.

The great diſtances of Montreal, one hundred and eighty miles from Quebec, alſo

alſo of Trois-Rivieres, and Dêtroit, deſerve attention; and it is an argument ſufficient for forming three courts of King's Bench, to ſave to your Majeſty's ſubjects the great expence of employing for every perſon, not only his attorney on the ſpot, but his agent at Quebec, beſides the fatigue and expence of travelling himſelf, and bringing up his witneſſes from the extreme boundaries of the province, in a very ſevere climate. I approve, however, that it ſhould be in the diſcretionary * power of your Majeſty's principal attorney-general, to remove any party for ſafety for a quick and more convenient trial to Quebec; but this ſhould be reſtrained to caſes of treaſon only.

It is a fact which deſerves attention, that for want of a good government ſince the conqueſt, the trade of furs has been but one third of what it was under the French, as appears by the exports.

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* Vide ſolicitor-general's report.

To

To look into the map, the ſituation of Dêtroit ſufficiently ſpeaks the propriety of ſome regulation of juſtice there; and more eſpecially as it is the mart and entrepot of the fur-trade and the Indian commodities, ſuch a regulation is neceſſary for the trade, and for preſerving peace and friendſhip with the Indian nations reſorting thither.

When Gaſpey ſhall be ſettled, a juriſdiction ſhould alſo be eſtabliſhed there; but I ſhould apprehend, from obſerving the ſituation and form of it in the map, that it might be very proper to unite it to the province of Nova Scotia.

I ſhould imagine it would be very uſeful if the judges were to have a power, in caſes were it might be thought neceſſary, by themſelves, to appoint commiſſioners in diſtant parts, with power to ſummon juries, before whom examinations may be taken, with proper ſolemnities, upon the

ſpot,

ſpot, and a verdict tranſmitted to the ſupreme court under ſeal, whenever a matter of fact, ſuch as concerning boundaries, waſte, dilapidations, execution of contracts, damages done, &c. is in diſpute.

The taking evidence in private upon affidavits ſhould be diſallowed, unleſs the parties ſhould conſent, or the court ſhould direct them to be taken upon a ſpecial cauſe, or proper grounds ſhewed upon motion by council. The injuſtice of parties being evidence upon their own cauſe, and the practice of cauſes being determined entirely upon affidavits, is too full of evil not to deſerve a peculiar attention, eſpecially if the party who makes the firſt affidavit, has not a liberty of a reply to the affidavit in anſwer; in the uſual practice, as I conceive it to be, equivocation and perjury muſt reign in full force.

It is propoſed, by Mr. Mazeres, that in caſes of debt to a certain amount (which ought

ought to be very conſiderable), an allegation, or plea of faculties or effects, being delivered by the plaintiff, the defendant ſhould anſwer upon oath, giving in an exact ſchedule of his eſtate and effects. This propoſition may be thought peculiarly hard in many caſes: but I conceive the ſtate of the country muſt determine the propriety or impropriety of the propoſal, and that ſuch ſchedule and account ought not to be called for without very ſpecial cauſe, to be determined in the diſcretion of the judges.

In a country in which there is very little money, but corn and other periſhable effects make the greateſt part of the property of the inhabitants, it may be right, in caſes of ſuits for ſome ſpecial property, of the periſhable nature of which a proof is made, that the whole at the requeſt of any one of the parties ſhould be liable, by an order of the court, to be ſold to the beſt bidder, by perſons to be named and commiſſioned

miſſioned to ſell by both parties; and that the amount ſhall be placed in the hands of the judge and his regiſter, in imitation of the civil law methods in *uſum jus habentium*, or for the account of the party who ſhall finally prevail in his ſuit; and the amount to be paid by them into the hands of the receiver of his Majeſty's revenue, for his Majeſty's uſe; and that bills be iſſued to the ſaid judge and regiſter by ſuch receiver for the repayment of the ſaid ſums, at the intereſt of three per cent. A meaſure which I ſhould conceive would be very uſeful to create a dependence upon, and ſtrengthen the hands of government in many views, as well as it would be equitable and advantageous to the reſpective parties.

It may be right, that the judges of the ſeveral courts in the province, ſhould be allowed a diſcretionary power in granting of full coſts, and taxing bills.

Inſtead

Inſtead of one provoſt-marſhal for the whole province, it is propoſed, that there ſhould be a ſheriff for each diſtrict, with ſome title or mark of honour to the perſon who ſhould bear it.

The two courts of common-pleas, eſtabliſhed by general Murray's ordinance of 17th September 1764, at that time with military men for judges, and prieſts aſſeſſors, and now having almoſt all the affairs of the colony brought before them, evidently tend at all times to leſſen the utility and conſequence of the ſupreme court.

Mr. Mazeres recommends that the province be divided according to its three ancient diſtricts of Quebec, Montreal, and Trois-Rivieres; that there ſhould be three royal courts, or courts of King's Bench, in each; that the judges ſhould have been barriſters at law, who have been exercent three years at the Engliſh bar, at leaſt, and who have a competent knowledge of the French

French language, and three King's attornies, and no other courts. Theſe courts to be limited to their reſpective diſtrict; co-ordinate indeed, but not concurrent, as not of equal authority every where, nor as liable to be controuled by each other: and this meaſure Mr. Mazeres recommends on a ground which appears to be very concluſive, that this diviſion is beſt adapted to the ſituation of the ſeveral parts of the province, and that the Canadians have been uſed to it, and that it is therefore moſt agreeable as well as convenient *. If this eſtabliſhment of three courts were to take place, then it is propoſed, in the ſame plan, that there ſhould be an appeal to the governor and council of the province, confined to a certain value, and from thence to your Majeſty in your privy council. The reaſon laid down is, that the appeal to the governor and council would preſerve a

* Printed Collection, p. 38.

uniformity of law throughout the whole province, and would obviate a difference of decision, which might gradually grow out of precedents in the three different diſtricts, if the three royal courts, or of King's Bench, were to be left perfectly independent, and not to unite in a third ſuperior court in the province.

It is alſo very well propoſed, that the three King's judges, and three attornies, ſhould be members of the council ex officio, ſo as to aid the governor and council upon appeals; whereby the beſt law abilities in the province would be employed in forming deciſions in the laſt reſort, which would be in fact checking any arbitrary proceedings of a governor, and forming the law of the province. That they ſhould attend the governor at certain times of the year, moſt convenient for hearing appeals, which is thought to be one month at Chriſtmas. To this I muſt add, in my humble opinion, a neceſſary limitation, that the

judge

judge from whom the appeal lies, and the King's attorney in his court, ſhall not ſit at the hearing of the cauſe appealed. It might poſſibly not be improper to add the judge of the vice-admiralty, and the advocate-general, to the number of the members of the council, as before propoſed.

That no appeal ſhould lie to the King and council under five hundred pounds, is thought by ſome perſons a hardſhip, and that it leaves no check upon the governor and council in leſs ſums of great value in ſo poor a colony.

It is propoſed by Mr. Mazeres *, that no new examinations ſhall be taken upon appeals in any cauſes, but only any error of the proceedings be corrected, and a new trial of any fact, if good cauſe is ſhewn, ſhall be granted; and a trial, by a double number of jurymen, if the loſing party re-

* Printed Collection, p. 38, 39.

quires it. That the method of proceeding in the firſt inſtance in civil actions * in the common law court, ſhould be as follows; the plaint is to be read to the judge in open court; if he determines that there is good cauſe of action, ſummons to iſſue, but not till then. If the plaint is admitted, it is to be filed as a record; if non-appearance of the party, or good cauſe ſhown of non-appearance, then the party ſummoned to pay coſts, at the judgment of the court, upon circumſtances, for the delay of ſuit; and freſh ſummons to appear again ſhall iſſue; if neglect to obey the ſecond ſummons, judgment to go by default. Anſwer to the plaint to be either in French or Engliſh, and to be filed. That the judge may interrogate the parties himſelf, in order to determine whether farther teſtimony is neceſſary. If either of the parties, on the judge determining that farther teſtimony and trial is neceſſary, chuſe to have

* Printed Collection, p. 33.

a jury,

a jury, the party praying it ſhall pay the expence of the jury's attendance; if both pray to have a jury, both ſhall pay. If the conteſt is between a native born ſubject and a Canadian, the jury to be de medietate, if either party ſhall require it: the jurymen to receive five ſhillings per man. For at preſent the Canadians, as it is ſtated upon good authority, complain of the attendance upon juries, in civil ſuits, as a heavy burthen and interruption of their occupations: though they like well enough to be tried by juries, they do not like to be the triers *, without ſome compenſation.

That any governor ſhould have it in his power to ſuſpend, ſuperſede, or otherwiſe controul, the counſellors or practitioners at the bar, is evidently liable to many objections. In my humble opinion, therefore, it ſeems neceſſary to enact, that for the better regulating all the public courts of

* Printed Incloſure, p. 38.

juſtice of the province, the chief juſtice ſhall have the ſole power of admitting and licenſing all advocates, counſellors, and pleaders, procurators, attornies, and ſolicitors, in the ſeveral courts of juſtice in this province; with power to make rules for the proper ſerving or education of ſuch perſons, and to examine them before admiſſion, and to reject them if he ſhall ſee cauſe; alſo to ſuſpend or deprive them of the exerciſe of their offices, for any neglect, contempt, delay, or malverſation, fraud, or undue proceeding, in his or any other court, when he ſhall ſee cauſe; and the governor of the ſaid province ſhall not interfere in the ſame in his public capacity.

It is alſo a point that merits great attention from government, that the notaries, who are a very uſeful and very reſpectable ſort of men, ſhould be continued with their uſual privileges, and have ſome advantages granted them, and ſhould be allow-

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ed to practiſe as ſolicitors and advocates, and even to be aſſeſſors.

It would be right that the law officers of the crown ſhould have honourable eſtabliſhments, ſo as to raiſe them high in reſpect from the inhabitants, and to make them leſs dependent upon private buſineſs. The ſalaries, as ſtated in the Incloſure Appendix, No. 15, are very mean and unworthy of men of education, abilities, and honour. Thoſe clients who pay beſt for time and labour, will certainly be beſt ſerved. An encreaſe of ſalaries will create an expence: but there may be a falſe œconomy; and there is no doubt of the truth of this propoſition, that a ſmall body of men of abilities in the law, ſent out and maintained by the crown in a manner adequate to their rank, and made independent of every private connection, will anſwer the views of government, and preſerve the peace of the colonies more effectually than ten regiments. What has been the conſequence in the colonies, and

elſewhere, of independent men of great abilities in the law, diſſatisfied, with reaſon or without, and who have gratified their own reſentment, or the views of a party, at the expence of the whole kingdom, I need not to obſerve, and ſhall only refer to that part of the report upon the civil government of the colony made by Mr. Yorke and Mr. De Grey, which is very ſtrong indeed upon this point *; of the meaneſs of the law eſtabliſhment, which has too long remained a diſhonour and a prejudice to your Majeſty's ſervice.

The ſecond head propoſed is a bill for declaring the common law of the province.

The Canadian lawyers are, it ſeems, not entirely agreed how much of the French ſyſtem of the cuſtom of Paris † has actually enured in the province of Canada. The capitulation for Montreal and the pro-

* Vide p. 156, Incloſure of the Board of Trade, Art. 2.

† Printed Collection.

vince,

vince, article thirty-ſix, which engages to preſerve to the inhabitants their property, ſeems to me to ſtipulate the *manner* in which that property is to be held; of conſequence the tenures are to be preſerved, and all the laws relative to that property. For it is not only the thing which we hold, but the manner in which we hold beneficially, that conſtitutes our property; therefore I conceive that all the lands in Canada, the property of native Canadians, or which have ſince paſſed by deſcent or by will, are, in virtue of the capitulation, ſtill governed by the law of France, as to the tenures or modes of holding; although by the forty-ſecond article of the capitulation granted for Montreal, and the reſt of the province of Canada, and by the ninth article of the treaty of Verſailles, *the inhabitants become ſubjects of your Majeſty.* How far your Majeſty's proclamation, and the commiſſions and inſtructions have or have not ſuperſeded this idea, ariſing out

of

of the terms of the capitulation and treaty, and how far the caſe of the new ſettlers, emigrants from Great Britain, and acquirers of lands by new titles, as by mortgage, grant or purchaſe, is capable of a diſtinction, has been already obſerved upon.

I think there is a great diſtinction between the treaty and capitulation; for the treaty, which makes the inhabitants ſubjects of your Majeſty's crown, confirms to them their property in no other mode than in a permiſſion to retire, and to ſell their eſtates, and thoſe reſtrained to be ſold to Britiſh ſubjects. So that if they ſtay and claim under the treaty only, they ſtay under condition of becoming, by their own free act, *Britiſh ſubjects*; and as ſuch ſubject to Britiſh laws. But the treaty made with the ſovereign power of France, which, without taking notice of the capitulation, transfers its ſubjects pleno jure, does not ſuperſede the capitulation made with the inhabitants; becauſe I conſider capitula-

capitulations, in the eye of the law of nations, to be not only as national, but perſonal compacts, and made with the inhabitants themſelves, for the conſideration of their ceaſing their reſiſtance. It is conſiſtent with the honour and intereſts of this kingdom, that they ſhould be religiouſly obſerved, and that the condition of the grantees ſhould be rendered ſubſtantially better, rather than worſe, ſo far as any perſon or perſons are capable of taking benefit of the grant.

At the ſame time I muſt obſerve, that I do not conceive that your Majeſty is ſo bound in your legiſlative capacity, that you cannot in parliament change the laws of ſucceſſion or heritage, or prevent the keeping up any corporate body eccleſiaſtical, by preventing a perpetual renewal by new members, or that your Majeſty cannot regulate any other general matter of dividing property real or perſonal, after the death of the poſſeſſor, in the ſame manner as your

Majeſty,

Majeſty, in parliament, may change the laws reſpecting your other Britiſh ſubjects; ſo that the law be not made to the prejudice of any particular private perſon while he lives. Inaſmuch, as no man naturally hath property after death, the community to which it reverts has a right to fix the law of partition after death, as it ſhall judge moſt for the benefit of all its members. The right to diſpoſe by will, or to make a private law for a family, is a privilege granted by the community; and reſtrainable, as the law of France reſtrains it more than that of England, by excepting the legitime and limiting deviſes of land in certain degrees, except by deed by and among parties living.

It would probably anſwer every juſt and reaſonable purpoſe, and would tend perfectly to quiet the minds of your Majeſty's Canadian ſubjects, if a bill were to paſs in parliament to the following effect. That in all caſes of wills, tenures, ancient rents,

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quit-rents, ſervices not being military, diviſions of lands, and transfers, hypothecations, or charges and pledges, or incumbrances of property, moveable and immoveable, and of hereditary deſcent, or partition of dower, or diſtribution in caſe of inteſtacy, the legitime, or portion of children and widows, and of all deeds, leaſes, and contracts, the ancient laws, cuſtoms, and uſages of Canada ſhall be valid; unleſs the ſaid cuſtoms and uſages ſhall have been deviated from by any conſent of parties by expreſs convention, or in which the modes of the Engliſh law, as in caſes of transfer between a Canadian and Engliſh born ſubject, ſhall have been followed; that in all caſes where ſuch cuſtom and uſages of Canada are relied upon, either by the party complaining, or the reſpondent, ſuch cuſtom and uſage ſhall be ſpecially pleaded. And in order the better to eraſe from the minds of the Canadian ſubjects, their ideas of veneration for the edicts of their late ſovereign, and

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for the arrets of the tribunals of France, and as much as poſſible to make them ſenſible of their union with, and dependence upon the Britiſh government, it ſhould be enacted, that the French law, known under the denomination of the cuſtom of the viſcounty and provoſtſhip of Paris, and ſo much thereof only as hath actually been practiſed in the province, ſhall be pleaded under the title of *the common law, and the cuſtom of Canada, as by act of parliament eſtabliſhed*, and under no other title whatſoever; and the abſtract of the ſaid cuſtom, as hath been drawn up by a committee of Canadian gentlemen of the law, ſhall be annexed to the bill to be referred to, as the ſole rule; obſerving only the alteration in the articles 99 and 101, as in the advertiſement or preamble of the ſaid abſtract is ſet forth; that lands already granted, or to be granted by your Majeſty, your heirs, or ſucceſſors, ſhall be holden in free and common ſoccage tenure, and ſhall paſs according to the

laws

laws of England: power always reſerved to your Majeſty to make grants of lands in any other mode of tenure, if to your Majeſty it ſhall ſeem meet.

The mode of doing fealty and homage for the Canadian ſeigniories already eſtabliſhed is extremely ſimple, as appears in the principal extracts of the French laws, c. 1. tit. *Foi et homage.* If it is proper to change it at all, it will be better to form a record of the title of the tenure in a more ſolemn manner, by regiſtering the homage.

It may be proper that the laws of the police hitherto eſtabliſhed and practiſed, ſhould be obſerved and carried into execution by the juſtices and other peace officers, and that his Majeſty's governor may, with the conſent and advice of his council, at any time, on the preſentment of any two or more houſe or land-holders, or any one of his Majeſty's juſtices of the peace, or law officers, iſſue ſuch freſh orders of

police

police as he ſhall judge neceſſary, from time to time, for the better maintaining the highways, ſtreets, bridges, paving, public edifices, wharfs, navigations, for preventing fire, and removing of annoyances to health, or to the free paſſage, in places where paſſage hath been uſual; provided that ſuch orders be ſubject to an appeal in caſes of property, above the value of ten pounds, to the chief juſtice of the ſaid province.

The Canadian inhabitants readily enough embrace the protection of the laws of England when they find they make for them. There is ſomething very whimſical in the caſe of M. St. Ange, which I have ſeen as ſtated upon great authority, and it ſhows the motly mixture of French and Engliſh laws in the province, and the confuſion reſulting from the uncertainty of them, and the want of a regular ſettlement. Mr. Grant purchaſed the eſtate of a minor, Mr. St. Ange; the former a Britiſh ſettler, the

latter

latter a Canadian. Mr. Grant never having ſeen the eſtate, paid a part of the purchaſe money, which was very conſiderable: upon a view of the eſtate he found it inferior in value to his expectations by one half. He was ſued for the remainder of the money; he pleaded the civil law of France, and inſiſted that he was intitled to a reſtitution *in integrum*, on proving the true value of the eſtate to be only one half. The Canadian inſiſted upon the laws of England, and a ſpecial performance of contracts, on the ground of the rule of the law *vigilantibus non dormientibus ſuccurrit lex*. This cauſe will probably find its way to the council at home.

The deſcription given by general Carlton, in his letter to the earl of Shelburne, No. 3. p. 90. 24th December 1767, of the confuſion of the courts of juſtice, and the conſequence of their proceeding by different rules is very ſtriking: *the governor and council, as a court of equity, reverſing the*

decrees of the ſupreme court of King's Bench, which reverſes that of the Common Pleas.

There are a number of edicts, declarations, rules, ordinances and proviſions, which have hitherto been the written law of the colony, and in actual uſe; which appear from the extracts to be ſo wiſe and well fitted to the nature of the colony, that although they cannot now operate by the authority of the French King, yet they ſeem many of them very proper to be adopted in the new ſyſtem of law to be given to the Canadians; and therefore it may be right that the ſubſtance of thoſe extracts which are proper ſhould be declared to be a part of the common law of the province of Quebec; and to be recited accordingly in this act of parliament, and to be pleaded under it, and not under any other title than as *the act of his preſent Majeſty for declaring the common law of the province.*

This article cannot be concluded without taking notice of the act of habeas corpus,

pus, the benefit of which, if extended to this province, may in policy be limited, on account of the peculiar circumſtances of the province, and the natural views of the court of France in caſe of a future war. The governor and council may have a power to ſuſpend the effect of the ſaid act, during the time of any hoſtilities or declared war, rebellion, inſurrection in arms, or invaſion of the province, or any other of the dominions of Great Britain.

The propoſition made by Mr. attorney-general Mazeres, in his printed draught of a bill for parliament for ſettling the laws of the province, deſerves a very particular conſideration, whether it may be uſeful (if it is thought proper to deviate at all from the French laws of Canada reſpecting civil property) to introduce the mode of diſtribution, ſo equitably ſettled by the famous act of Charles II; the Engliſh law of dower; of wills of perſonal and *real* eſtate (in which latter caſe, the French

by their own law are under ſome reſtraint); inheritance in deſcent, and of coheirs; with ſome alterations in the French and Eng- law more conſonant to natural equity with reſpect to parents in the right time aſcending inheriting the lands of children, in default of heirs in the deſcending line, or of brothers and ſiſters in the collateral, and leſs conſonant to the feudal principle; which reſtrains that aſcent, and which gives, according to the law of England, the preference to the uncle to inherit the lands of his nephew before the father of that nephew.

In the preface to the abſtract of the laws of police, drawn up by the Canadian lawyers, great complaint is made of the not obſerving the arret of the council of ſtate of 28th April, 1745, which forbids the building any houſe or outhouſes with ſtone or timber, unleſs the owners have annexed a French acre and a half in breadth, by thirty or forty in depth, on pain of a hundred livres as fine, and demolition; except

cept granaries, hay lofts, and ſtorehouſes. It is repreſented that the preſent inhabitants avail themſelves of the laws of England, and croud together, as it is natural; in conſequence of which many of them live very miſerably and idle; and the lands which are more remote remain uninhabited and without cultivation. To endeavour to enforce the ſubſtance of this arret, by any act of the Britiſh legiſlature, would be deemed a hardſhip unnatural to the freedom of our government, nor would ſuch an act be carried into force: and therefore, like all other acts unexecuted, which are found to be mere ſwords in the ſcabbard, it would only ſerve to weaken the high idea the people yet have of the ſovereign authority.

The preſent allotments of lands are thought, being parcelled out in contiguous columns of a certain breadth and depth running up from the river St. Laurence, to be the beſt calculated partitions

poſſible for the maintenance of each ſeparate family and for mutual aid and defence; and therefore the preſerving of the indiviſibility of theſe allotments is an object which is thought to merit the attention of legiſlature: with this view Mr. Mazeres propoſes, in a printed draught of an act of parliament, an alteration of the laws of inheritance, to take effect at a diſtant period, ſo as to hurt no perſons now living, who therefore cannot complain; which alteration might anſwer the purpoſe: beſides, that by the power of making wills or deeds, every man has it in his power to form another law for himſelf, and his family, deſcendants, or deviſees, ſo as to render any fixed law of inheritance of no effect, if it does not fall in with his own ideas; by theſe means, agreeably to the ſpirit of human pride, which carries its views beyond the grave, he may unite all the lands he poſſeſſes, in one hand, and in a certain line, the firſt point of which the teſtator is delighted to form, and to extend himſelf into an ideal

perpetuity

perpetuity by ſucceſſion. The French law reſtrains at preſent the power of deviſing by will, by its alloting portions called the legitime; the Canadians may defeat the new law of inheritance as propoſed, at their own pleaſure, if it were to take place by their wills or marriage contracts. The modification of introducing the law of primogeniture to take place at a certain diſtant period, ſtrikes me as very prudent; becauſe I am fearful that nothing would tend more certainly to give diſguſt to a people, however diſpoſed to ſubmiſſion, than an immediate alteration of ancient laws of inheritance, well known among them, and ſettled by uſage into a kind of holy reverence.

A change of the law of dower, and of all that article of the French law concerning property between huſband and wife in communauté might be rendered uſeleſs, if the propoſed change on this head were carried into execution: for altho' the French

law has its ſubtilities, and might be amended and ſimplified by the introduction of the Engliſh law of dower; yet the fact is, the law of dower is rendered ineffectual in England, by the creation of truſts, and frequency of marriage ſettlements: the French are particularly accuſtomed to make formal marriage contracts, even when a very ſmall property is the object of thoſe conventions, and among the loweſt people.

In reſpect to wills, I approve the amending the Engliſh ſtatute of frauds, and extending the ſame formalities to perſonal eſtates as to land. The propoſed article, that no will ſhall be valid, which is not executed ſeven days before the death of the teſtator, with ſeveral amendments of the ſtatute, will be of very great ſervice, yet not ſufficient, in my opinion, to prevent fraud, which the ſolemnities of the very forms, required by the above ſtatute in the caſe of lands, have rather furniſhed with tools to intrench itſelf inſtead of defeating it.

it. Nothing can effectually deſtroy fraud but the atteſtation of public perſons; the lodging an authentic copy ſealed with a magiſtrate, by the teſtator himſelf, and the revocation as formal as the making of a will: all which I think is admirably well anſwered by confirming the French law, as in the printed extract, Tit. XIV. Art. 1. If the diſtance of ſeven days between making the will and the death of the teſtator were added, in order to give validity to an act requiring ſo much deliberation as a laſt will, it might be ſtill better, and that even the party ſhould have appeared at ſome place of public worſhip, and according to the Scotch law, at market, if there is one, in the interval between making his will and before his death.

The Engliſh law of diſtribution of perſonal eſtates in caſe of inteſtacy, I conceive to be a very good law, becauſe very clear and very equitable. It ſeems unreaſonable that the Engliſh ſettlers ſhould

ſubmit

ſubmit to the French law in regard to perſonal, however they may acquire lands under the French law, now propoſed to be adopted, ſo as to be conſidered hereafter as the Engliſh common and local law of the province. An uniformity of the law of perſonal eſtate would be extremely convenient and uſeful for all the inhabitants in a commercial country, and it would prevent great confuſion when Canadian and Engliſh families come to be more mixed. As lands are a permanent, but perſonal is a floating property, the laws relative to them may well be made different; the policy which regards the encouragement of perſonal induſtry and commerce on one hand, and the permanency of landed poſſeſſion, for the purpoſe of keeping up degrees of ſubordination in the ſubject, and for the better tillage and military defence of a kingdom on the other hand, dictates this diſtinction.

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At the ſame time I conceive that the French laws of diſtribution of perſonal property, in caſes of inteſtacy, and the legitime have a great deal of equity; yet with reſpect to the partage of their lands among all the children, without regard to primogeniture, it is attended with great inconveniencies to themſelves. Nothing reduces the families of the ancient French ſeigneurs to miſery more than the diviſion and ſubdiviſion of their lands by their own law; a law, which though it appears at firſt to breathe more the ſpirit of democracy than of monarchy, yet it is in fact calculated for a military government only; becauſe nobles ſo reduced can and will only live by the ſword *. The allotments to the

* Des les premiers jours de la colonie, on l'avoit comme étouffée au berceau, en accordant à des officiers à des gentilhommes un terrein de deux à quatre lieues de front ſur un profondeur illimitée. Ces grands propriétaires hors d'état par la mediocrité de leur fortune et le peu d'aptitude à la culture, de mettre en valeur de ſi vaſtes poſſeſſions, furent

the under tenants in Canada are about eighty acres, juſt ſufficient in that cold country for ſummer paſture and winter fodder, for the cattle of one family. I have no objection to any middle ſyſtem between the French and Engliſh law, better calculated for keeping up a ſort of yeomanry or gentry, with eſtates or ſeigniories as now allotted, of about two or three hundred pounds a year when well cultivated, and to be indiviſible; provided that it is right to new model the colony all at once. Probably every year, as more remote from the conqueſt, will leſſen the ſubordination of the people, and may encreaſe to your Majeſty's government, the difficulties of any future reformation, of both the law of England, and of France.

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furent comme forcés de les diſtribuer à des ſoldats ou à des cultivateurs, à charge d'une redevance perpetuelle. C'etoit introduire en Amérique une image du governement féodal qui fut long temps la ruine de l'Europe. Hiſtoire Politique, tom. vi. p. 143.

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The propoſitions of Mr. Mazeres on this head, the reflection of governor Carlton on the cloſe of his letter, No. 5. (propoſing a few companies of Canadian foot and officers) upon the effects of diviſion and ſubdiviſion of lands in every generation; the idea of the French government in the arret quoted, but impracticable to execute, and the laws of Normandy, which agree in part with the propoſitions of Mr. Mazeres, are reaſons in favour of this change. Whether it may be a meaſure fit at the preſent, or at a future time, and by what authority to be carried into execution, muſt be ſubmitted to the opinion of thoſe perſons who are beſt acquainted with the diſpoſition of the inhabitants, and the ſtate of the colony in the preſent partitions, and to your Majeſty's royal wiſdom, upon the queſtion of the preſent expediency. The detriment to the French colonies, as an obſtacle to the clearing and cultivation of more lands, ariſing from the French law of partition, is ſo ſtrongly painted by a French writer of

great

great authority and abilities, that his his opinion appears to me to be concluſive: I have therefore given the whole of his opinion in the margin *. There

* Qui le croiroit? Une loi qui ſemble dictée par la nature même, qui ſe preſente au cœur de l'homme juſte et bon: qui ne laiſſe d'abord aucun doute à l'eſprit ſur la rectitude et ſon utilité: cette loi cependant eſt quelquefois contraire au maintien de nos ſocietés: elle arrête les progrès des colonies, les écarte du but de leur deſtination; et de loin elle prépare leur chûte et leur ruine. Qui le croiroit? C'eſt l'egalité de partage entre les enfans ou les coheritiers. Cette loi ſi naturelle veut être abolie en Amerique.

Ce partage fût neceſſaire dans la formation des colonies. On avoit à défricher des contrées immenſes. Le pouvoit on ſans population? et comment ſans proprieté fixer dans ces regions éloignées et déſerts des hommes qui les plus part n'avoient quitté leur patrie que faute de proprieté. Si le gouvernement leur eut refuſé des terres ces avanturiers en auroient cherché de climat en climat, avec le déſeſpoir de commencer des établiſſement ſans nombre, dont aucun n'auroit pris cette conſiſtance qui les rend utiles à la metropole.

Mais depuis que les heritages d'abord trop étendus ont eté reduits par une ſuite de ſucceſſions et de partages ſoudiviſés, à la juſte meſure qui demandent les

There is one more obſervation which is to be made, before I diſmiſs the ſubject of landed

les facilités de la culture; depuis qu'ils ſont aſſez limités pour ne pas reſter en friche par le défaut d'une populatiou équivalente a leur étendue, *une diviſion ultérieure de terreins les feroit rentrer dans leur premier néant.* En Europe, un citoyen obſcur qui n'a que quelques arpens de terre, tire ſouvent un meilleur parti de ce petit fonds, qu'un homme opulent des domaines immenſes que le hazard de la naiſſance ou de la fortune a mis entre ſes mains. En Amerique, la nature des denrées qui ſont d'un grand prix, l'incertitude des récoltes peu variées dans leur eſpece, la quantité d'eſclaves, de beſtiaux, d'utenſiles néceſſaires pour une habitation: tout cela ſuppoſe des richeſſes conſiderables qu'on n'a pas dans quelques colonies, et *que bientôt on n'aura plus dans aucune* ſi le partage des ſucceſſions continue à morceler, à diviſer de plus en plus les terres.

Q'un pere en mourant laiſſe une ſucceſſion de trente mille livres de rente. Sa ſucceſſion ſe partage egalement entre trois enfans. Il ſeront tous ruinés ſi l'on fait trois habitations: l'un parcequ'on lui aura fait payer cher les bâtimens, et qu'à proportion il aura moins de negres et de terres; les deux autres parcequ'ils ne pourront pas exploiter leur heritage ſans faire bâtir. Ils ſeront encore tous ruinès, ſi l'habitation entiere reſte à l'un des trois. Dans un

pais

landed inheritance, that both by the subtilities of the Engliſh and of the French laws, the commutation of landed property is rendered liable to much delay, difficulty and litigations on titles, and prevents its being brought into commerce ſo much as it might; which is a matter of the utmoſt importance in any commercial country, particularly in a new colony, where credit wants every ſort of ſupply and foundation

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pais où la condition du créancier eſt la plus mauvaiſe de toutes les conditions, les biens ſe ſont élevés à une valeur immodérée. Celui qui reſtera poſſeſſeur de tout ſera bien heureux, s'il n'eſt obligé de donner en intérêts que le revenu net de l'habitation. Or comme la premiere loi eſt celle de vivre, il commencera par vivre et ne pas payer. Ses dettes s'accumuleront. Bientôt il ſera inſolvable; et du déſordre qui naîtra de cette ſituation, on verra ſortir la ruine de tous les cohéritiers. L'abolition de l'egalité des partages eſt la ſeul remede à ce déſordre. Hiſtoire Politique, tom. vi. p. 155, 156, 157. The author goes on to prove that the great load of debts due both within the French colonies, as well as to the mother-country, which ruins all their eſtabliſhments, is occaſioned by the law of partition and ſubdiviſion of lands *ad infinitum* in ſucceſſions.

dation. The rêtrait lignager and feodal makes a part of the French law, whereby the lord or next heir muſt be parties conſenting to the ſale of every eſtate, and to have a right of lods and ventes of reſuming and pre-emption within a year, which right is a twelfth part of the purchaſe-money, and cannot be taken away without injury to the proprietor, the lord having taken a ſmall rent (originally from his under-tenant) with a view to theſe fines of alienation to a ſtranger, which are the great profit of all ſeignories. So that if the lord had not this power of reſuming, he might be defrauded by a ſale for a leſs pretended ſum than was actually paid. Theſe ſubtilities introduced however into the forms, often defeat the lord and the heirs; becauſe the deciſions of the courts of France, adapting their interpretation of the ancient exiſting laws to the wants and manners of the times, endeavour to ſap all theſe obſtacles, and to introduce by degrees, and by conſtruction of law, an eaſy

commutation of landed property, neceſſary in an age of commerce. If, therefore, the mode of tenure is to be changed, as it is propoſed, ſome compenſation ought to be given to the lord and heir, as in the caſe of extinguiſhing the heretable juriſdictions in Scotland. The leaving it in the power of a ſeigneur, at the age of majority, now made twenty-one by an ordinance, to change his tenure into common ſoccage, and deſcendible by the Engliſh or by ſome more convenient mode of inheritance adapted to the nature and cultivation of the lands in allotment, is an option to which no Canadian can have any objection.

Third Article. *A bill is propoſed for the better raiſing and collecting his Majeſty's revenue.*

On this ſubject it may be proper that caſes touching the King's revenue, whether inward or outward, ſhall not be tried by juries. The facilities, the certainty and cheapneſs

cheapneſs of collecting, and ſettling appeals concerning the land-tax in England, are an admirable example, how eaſily men may be reconciled to public burthens, if they are but complimented with the buſineſs of levying and judging of them themſelves. As the ſupporting the province with all the neceſſary and executive parts of government depends upon raiſing an adequate revenue *; and as intereſted juries will always ſuffer to eſcape the perſons of thoſe who defraud it; a Britiſh parliament, ſo uſed as it is to the modes of the revenue laws in England, may eaſily be brought to introduce into Canada, ſome of the ſame modes of taxation as in England.

* L'adminiſtration des finances ne percevoit au Canada que quelques foibles lods et ventes. Une legere contribution des habitans de Quebec et Montreal pour l'entretien des fortifications de ces places, des droits, mais trop forts, ſur l'entrée, ſur la ſortie des denrées et des marchandiſes; tous ces objets ne produiſoient au fix en 1747 qu'un revenu de deux cens ſoixante mille deux cens livres. Hiſtoire Politique, tom. vi. p. 143.

If a certain number of the principal land-holders of the Canadian ſeigneurs were to be appointed, together with his Majeſty's governor and judges, to be commiſſioners, with the title of tres illuſtres, or right honourable, to hear and determine finally all matters and cauſes touching the receipt and collection of all taxes and inland duties raiſed, or to be raiſed, fines of ſeigniories, and other dues of his Majeſty's ſeignioral rights (concerning which difficulties have been made) and revenue of what nature or kind ſoever, it would, together with a competent ſalary, be a flattering circumſtance to the Canadian landed gentry who ſhould have theſe commiſſions, and would ſerve effectually to prevent evaſions of the revenue laws of any ſort, now or hereafter, on the part of the commercial inhabitants, chiefly Engliſh, and who are the people moſt tempted to evade them. But this regulation ſhould by no means extend to take away from the admiralty court its juriſdiction concerning duties and

and forfeitures, under the acts of trade; but that the officers of the crown may ſue there as uſual, and as they ſhall judge proper: but with a ſpecial clauſe, that in all caſes where, by the acts of trade, his Majeſty is intitled to any part of the forfeiture, all ſuch cauſes ſhall be carried on, both in the firſt and ſecond inſtance, in the name of his Majeſty's advocate-general, in order to prevent colluſive deſertion of the cauſe, or appeal, on one ſide, or unjuſt harraſſing of the ſubject on the other. This will be agreeable to the practice in England, where all ſuch cauſes are carried on in the court of Exchequer, in the name of his Majeſty's attorney-general, by act of parliament.

Under the articles of revenue, the propoſition of colonel Carlton, Appendix, No. 12. ſeems very proper to be eſtabliſhed. That all veſſels coming up the river ſhall be obliged to enter at Quebec, and ſhall not break bulk at any place before they arrive there.

The propoſed duty upon rum will alſo deſerve the conſideration of government; and it is underſtood, that there is already ſome bill prepared upon this head, and now under conſideration of the board of treaſury.

There are very able informations on the ſubject of duties in this province, in a private paper of Mr. attorney-general Mazeres.

As it appears that your Majeſty's governors have omitted to require the oaths of fealty and homage, legal doubts have been ſtarted, whether the fines to the crown, upon the alienation of lands, and other ſeignioral rights, are due till ſuch fealty and homage have been done: it ſhould therefore make a part of the bill touching the revenue, that all dues heretofore paid to the French king, whether ariſing out of lands, or under any other denomination whatſoever, are payable and

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to be paid to your Majeſty, your heirs, and ſucceſſors, unleſs your Majeſty ſhall, of your royal grace and favour, remit the ſame for the greater encouragement of your new ſubjects.

The ſeigneur-paramount has what is called the quint. To the ſeigneurs, the fines are a twelfth part of the real purchaſe-money bona fide paid; and if the vendor pays it immediately, two thirds of a twelfth only are taken, which are equivalent to an eighteenth of the whole purchaſe-money. The fluctuation of property has been ſo great ſince the conqueſt, that the fines of alienation have been very beneficial to the lords, and conſequently there muſt be conſiderable ſums due to your Majeſty on the ſame account.

Fourth article. *A bill is propoſed for giving leave to your Majeſty's Roman catholic ſubjects in the ſaid colony, to profeſs the worſhip of their religion, accord-*

ing to the rites of the Romiſh church, as far as the laws of Great Britain permit, which are already in force, and antecedent to the definitive treaty of peace, concluded at Paris, 10th February 1763, and for the better maintenance of the clergy of the church of England already eſtabliſhed in the ſaid colony.

The treaty gives the ſuperiority to the laws of England: it underſtands them all to be introduced into the colony ipſo facto. The treaty ſtipulates clearly that the laws ſhall not be *changed* in this article with your Majeſty's aſſent, and by the national legiſlation, but ſhall ſtand as they did ſtand, as the law of the realm in being at the inſtant of the contracting.

It is then the queſtion, how far the laws of England affect the caſe of the Romiſh religion? In England very much: if executed; in the colonies ſettled by ourſelves, no notice has been taken of it: ſo ſome

penal

penal laws, in other caſes of trading property and revenue, have been very lightly enforced there formerly, even when the colonies have been expreſſedly mentioned. But if the penalties of the laws are not felt by the profeſſors of the Romiſh religion in England, it is by connivance from humanity or policy, not to weaken or depopulate, that the laws are ſuſpended but not abrogated.

The firſt thing that ſtrikes upon this head, is an opinion, that the penal ſtatute laws of England, in relation to religion, do not extend to the other Britiſh colonies, and ſo it ſeems to be agreed by many; and that the Roman catholic worſhip and profeſſion of it therefore, ſub modo, and in a certain way, may be permitted, or rather connived at in them, without breach of the fundamental laws of England, under reſtrictions.

If the exerciſe of the power of the papal ſee cannot be permitted in the ancient colo-

colonies of the crown by exiſting law, it is clear that it cannot be permitted in a new acquired colony, when the ceded colony is put by the treaty on the ſame footing with the ancient colonies, by leaving it to the laws of the realm.

With regard to Canada, in the fourth article of the treaty it is declared, *that his Britannic Majeſty ſhall give the moſt effectual orders that his new Roman catholic ſubjects may profeſs the worſhip of their religion, according to the rites of the Romiſh church, as far as the laws of Great Britain permit.* I ſtate the article in the French language, for the greater clearneſs and preciſion in arguing upon it. *Sa Majeſté Britannique convient d'accorder aux habitants de Canada la liberté de la religion catholique, en conſequence elle donera les ordres les plus precis et les plus effectifs pour que ſes nouveaux ſujets catholiques puiſſent* profeſſer le culte *de leur religion ſelon* le rit *de l'Egliſe Romaine*, en tant que *le permet-*

tent

tent les loix de la Grande Bretagne. By theſe terms it appears, that not the profeſſion of the doctrines, but the profeſſion of the exerciſe of external ceremonies is only ſtipulated for: and the article is very equivocal, whether that profeſſion is to be public or private; for the word *profeſſion* may be inſiſted upon either way: and as for the degree, the article is *en tant que, as far as*, and in *ſuch degree, as the laws of Great Britain permit* at the inſtant of contracting. *Les loix de la Grand Bretagne* is a general term, and theſe words being in the plural number, and the verb *permettent* in the *preſent* tenſe, muſt mean conſiſtently with the general ſyſtem of laws of Great Britain, now exiſting in their totality; any of which, tacit or written, may operate with regard to this ſubject. The treaty conſiders the toleration as limitable in the degree and manner of it accordingly.

The makers of the treaty of Verſailles, ſeem to have had in their eye the eleventh article

article of the treaty of Utrecht, reſpecting the ceſſion of Minorca to the crown of Great Britain. In the capitulation of Minorca, there was no article reſpecting laws or religion; becauſe general Stanhope took poſſeſſion in the name of the archduke, as King of Spain. *Spondet inſuper regia ſua Majeſtas Magnæ Britanniæ ſeſe facturum ut incolæ omnes inſulæ præfatæ tam eccleſiaſtici quam ſeculares bonis ſuis univerſis et honoribus tuto pacatèque fruantur atque religionis Romanæ catholicæ liber* uſus *iis permittatur, utque etiam ejuſmodi rationes ineantur ad tuendam religionem prædictam in eadem inſulâ, quæ à gubernatione civili atque a legibus Magnæ Britanniæ pænitus abhorrere non videantur. Moreover, her Britannic Majeſty engages, that all the inhabitants of the ſaid iſland, as well eccleſiaſtics as laity, ſhall enjoy, in quiet and ſafety, their properties and honours, and that the* free uſe *of the Roman catholic religion ſhall be allowed them; ſo that meaſures of ſuch ſort ſhall be entered upon for the protecting the ſaid religion in*

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the ſaid iſland, which meaſures ſhall not appear to be abſolutely inconſiſtent with the civil government, and the conſtitution of England. Here the *uſe* clearly relates to the uſe of ceremonies. The fact is, the inhabitants of Minorca enjoy their religion, and their church government, which is ſomething more, as effectually as if they remained under the crown of Spain; and the courſe of appeal lies, from the biſhop of Majorca, who has the eccleſiaſtical juriſdiction as biſhop of Minorca, although a ſubject of Spain, to the Pope himſelf. This ſuſpenſe of the law of England, with reſpect to the people of Minorca, however does not alter it.

Now I conceive that the laws and conſtitution of this kingdom permit perfect freedom of the exerciſe of any religious worſhip in the colonies, but not all ſorts of doctrines, nor the maintenance of any foreign authority, civil or eccleſiaſtical, which doctrines and authority may affect the

the ſupremacy of the crown, or ſafety of your Majeſty and the realm: for a very great and neceſſary diſtinction, as it appears to me, muſt be taken between the profeſſion of the worſhip of the Romiſh religion, according to the rites of it, and its principles of church government. To uſe the French word, *the culte*, or forms of worſhip or rituals, are totally diſtinct from ſome of its doctrines; the firſt can, may, and ought, in my humble opinion, in good policy and juſtice to be tolerated; the ſecond cannot be tolerated.

The twenty-ſeventh article of the capitulation for the ſurrender of Montreal, and the whole province of Canada, which is *on the demanding part* of the Canadians, beſt explains their own meaning and that of the treaty; the words are, *Demanded, that the free exerciſe of the Roman catholic religion ſhall ſubſiſt entire*, in ſuch manner, *that all the people ſhall continue to aſſemble in churches, and to frequent the ſacraments*

as

as heretofore, without being moleſted in any manner, directly or indirectly. And ſo far (taking this to be the true ſenſe of the treaty demonſtrated by thoſe who are to have the benefit of it, agreeably to their petition) I think a Britiſh act of parliament may go in terms for the toleration of the form of worſhip, in manner and degree, without breach of the fundamental laws of the conſtitution; and it is a ſufficient anſwer to all the world, to ſay, the contracting parties have the ſtipulation executed in the manner exactly as demanded, and no other.

But in a queſtion of this kind, before it can be ſaid that the whole ſyſtem of the church of Rome, not only of its ceremonies, but of its doctrines, can be tolerated by the laws of England, anteeedent to the conqueſt and treaty, which refers back to them, it muſt be conſidered what the ſyſtem of the Romiſh church actually is; not only *as controuled in France by the ſovereign and*

and civil power, but as the great political ſyſtem of the court of Rome with all its pretenſions.

With reſpect to the ritual, it is calculated for the eyes and the ears of an ignorant multitude, and not for the head or the heart, while it is in an unknown tongue. Yet ſuch as it is, there is no great political conſequential evil can follow from this culte, or mode of worſhip, being ſuffered to remain among ſuch a people. It is innocent enough; and it would be cruel as well as unjuſt, to deprive them of the pleaſure and comfort of religious rites in their accuſtomed way.

The exerciſe of the Romiſh worſhip being therefore politically fit to be tolerated in Canada, the queſtion is, is it equally fit to tolerate all the doctrines of the Romiſh church, or the eccleſiaſtical eſtabliſhments, and powers for the ſupport of the doctrines?

To

To this I anſwer no: and for this plain reaſon, becauſe the Romiſh religion itſelf (of which the conduct of France in many inſtances in hiſtory, with reſpect to conquered places, affords ſufficient example) *will neither tolerate nor be tolerated.* In ſome of the articles of its ſyſtem, on the preſumption of its being the dominant ſyſtem among the ſeveral ſtates of Europe profeſſing Chriſtianity, it will give no quarter, and therefore it cannot take it without the deſtruction of the giver.

In order to judge politically of the expediency of ſuffering the Romiſh religion to remain *an eſtabliſhed religion of the ſtate* in any part of your Majeſty's dominions, the Romiſh religion (I mean its doctrines, not its ceremonies) ought to be perfectly underſtood.

The opinion of the royal author of the Memoires of Brandenburgh, ſeems to be concluſive on this head to every ſovereign

power; that the proteſtant religion is the beſt, both for the prince and the people: becauſe there is no middle power to intervene and ſtand before the prince againſt the people, nor before the people againſt the prince *.

The avowed *ſupremacy* of the papal ſee, touching all civil governments, the doctrines laid down by the greateſt writers in its favour, who have had the ſanction of the conclave, and been canonized ſaints for their ſervice, as well as the eſtabliſhments of the regular clergy, in oppoſition to the ſecular, who are more ſubject to the ſtate than the former, are circumſtances which have made the ſyſtem of the church of Rome ſo much the ſyſtem of an imperium in imperio, that it ſtrikes upon all royal and civil authority. It would be well if on this head it were not neceſſary, from the

* Vide art. iii. p. 277. Memoires de Brandenburgh.

nature

nature of things, to make any change in the eccleſiaſtical eſtabliſhments already in the colony of Quebec.

It is a great miſtake to ſay, that all ſyſtems of religion are alike and indifferent. They are by no means ſo in a political view. As true religion is a reaſonable and well-grounded ſenſe of hope and fear of reward and puniſhment in a future ſtate, ariſing from the belief of a ſupreme all perfect being, ſo falſe religion, or ſuperſtition, as Plutarch defines it, is an unreaſonable and exceſſive dread of inviſible agents. The feelings of want, pain, and dependency upon ſome cauſe unſeen, fill the heart of the boldeſt man, who is conſcious of evil, at certain times with horror. Religion thus, whether true or falſe, whether in reaſon or in exceſs, as a principle of action, neceſſarily unites itſelf with every ſyſtem of civil government; becauſe every civil government is founded upon the ſame common principle

with every ſyſtem of religion, the principle of fear. *Knowing the terrors of the Lord, we perſuade men*, ſaid the great orator and apoſtle to the Gentiles. But religious laws have a double force, becauſe they apply to the hopes as well as to the fears of men; whereas the prohibitions of the civil ſtate apply only to their apprehenſions of puniſhment.

It is plain, therefore, that a religious ſyſtem may be calculated, and has been calculated, ſo much more dazzling in its ceremonies, and ſo much more effectually operating than any other ſyſtem of the ſame ſort upon the hopes and fears of mankind, that thoſe men who have undertaken the application of this particular ſyſtem into their own hands, have been at once prieſts and legiſlators, in the firſt inſtance; and more than monarchs in the ſecond. They have eſtabliſhed what Archimedes ſought for; that footing upon ſomething out of this globe on which to raiſe

raiſe a machinery which might controul its movements, and ſhake it to its center. In the ſecond inſtance, they have ſo far affected all civil government, that they have raiſed up an empire more laſting than that of ancient Rome, and more extenſive than that of its arms, becauſe this power which operates on the minds of men, has a greater command and force than that which operates on their bodies. The miſſionaries of the church of Rome, have been but the avant-coureurs of the troops of princes profeſſing that ſyſtem of religion: and the croſs, ſet up to denote occupancy and conqueſt, has rouzed, when military muſic has ceaſed to animate the ferocity of men. Religion, or rather the ſyſtem of it, as a kind of mixed government, made up of ſpiritual and temporal influences, being thus become an engine of ſtate in a certain degree in every civil government under the ſun, it behoves all wiſe legiſlators to be attentive to the operation of it, leſt the machine being ſo large

and weighty, when uſed by unſkilful hands may overthrow that very government, and ſubordination of civil life, which it is meant to ſupport: for the legion of eccleſiaſtics may prove as powerful in ſubverting, as in maintaining princes and ſtates, like the prætorian cohort of the Roman emperors, when they pleaſe to be for or againſt.

It is the more neceſſary to enter into theſe obſervations, becauſe the liberties of the Gallican church, in oppoſition to the authority of the ſee of Rome, make a part of the eccleſiaſtical eſtabliſhment of Canada, and have great conſequences with reſpect to your Majeſty's rights.

The idea of a church or religious aſſociation, which is to be conſidered as an independent contracting party, and which enters into terms with the civil ſtate as an ally, is a treaty offenſive and defenſive, which I have not yet met with in the code

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of the law of nations. The miniſters of religion certainly deſerve the protection of the ſovereign power and civil magiſtrate in the higheſt degree, while they obſerve the firſt principles of religion, humility, and obedience. But the moment they aſſume ſupreme powers, it becomes neceſſary to controul them: and here I cannot but refer to a former report of your Majeſty's advocate, attorney and ſolicitor-general, January 18th, 1768, upon this ſame ſubject, *that if it is neceſſary that a perſon ſhould be appointed,* as ſtated, *for ſuperintending the affairs of the Romiſh church, his powers ſhould be ſo checked and guarded, that no pretence may be afforded thereby to obſtruct your Majeſty's ſervice or due courſe of law; for if the perſon ſo to be appointed ſhould be to judge himſelf what powers are neceſſary to the exerciſe of that religion, he may aſſume ſuch as are not permitted by our laws.*

The efficacy or inefficacy of certain ceremonies, or *opus operatum* in the hands or even intentions of the prieſt alone, and juſt as he ſhall pleaſe to apply them, upon the happineſs or torment of men in a future ſtate, the doctrines of purgatory, of confeſſion, and abſolution, the authority of eccleſiaſtical ſentences, and the ſupreme irreſiſtible power of the triple diadem of the papal ſee, not only extending to all eccleſiaſtical perſons and things which neceſſarily involve civil rights, but to the heads and necks of ſovereign princes, are circumſtances formidable and deſtructive to every government, more eſpecially to any government which is of a mixed form, and under which the ſubject lives in a ſtate of civilization and knowledge. Theſe are juſt reaſons for which a ſyſtem of ſuch a nature cannot be ſafely tolerated in reſpect to certain parts of its doctrines. And therefore when the increaſe of learning, and conſequently of free reflection among the inhabitants of Europe, introduced a reformation

reformation of religion, the ſtatute of 1 Eliz. chap. 1. was made in theſe kingdoms, in direct oppoſition to the firſt principle of religious doctrines of the church of Rome, viz. the pope's ſupremacy. The ſixteenth ſection is as follows. *To the intent that all uſurped and foreign powers and authority ſpiritual and temporal may for ever be clearly extinguiſhed, and* never *to be uſed or obeyed within this realm, or any other your Majeſty's dominions and countries that now be or* hereafter ſhall be; *but from henceforth the ſame ſhall be clearly aboliſhed out of the realm and all your Majeſty's dominions for ever. Any ſtatute, ordinance, cuſtom, conſtitutions, or any other matter or cauſe whatſoever to the contrary notwithſtanding.* This ſtatute is ſo plain and explicit, and is ſo fundamental a part of the conſtitution of this kingdom, and the power therein declared ſo indefeaſibly inherent in the crown of theſe realms, that for your Majeſty to conſent to any act of legiſlature which ſhould tolerate

lerate ſuch parts of the Romiſh religious ſyſtem as are before recited, would be to abdicate and renounce the right of your own ſovereignty. If your Majeſty were to conquer a country of infidels, profeſſing the religion of Mahomet, that religion, if it were to forbid obedience to or keeping faith with Chriſtians, would by law be abrogated *ipſo facto:* and ſo my lord Coke lays it down in Calvin's caſe *. The letter and ſpirit of the laſt recited ſtatute are ſo applicable to the ſtate of the Romiſh clergy in Canada, that it ſeems neceſſary to conclude with a former report † of your Majeſty's advocate, and of the then attorney and ſolicitor-generals ‡, *that your Majeſty, as you are not bound to prohibit the forms of worſhip of the Romiſh church hitherto by uſage eſtabliſhed in Canada, ſo your Majeſty is at liberty to tolerate thoſe forms,*

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* VII. Rep.

† Vide the Report in the papers referred to 18th January 1768.

‡ De Grey and Willes.

and

and ſo far and in ſuch a way as not to violate your royal ſupremacy over all perſons, and in all cauſes civil and eccleſiaſtical. And your Majeſty may, the better to attain that end, regulate and reſtrain the profeſſion of the worſhip of the church of Rome. The board of trade have reported * in their own own opinion of the treaty, (a concluſion adopted by them upon the repreſentation of general Murray, which is annexed to the report) *That it is neceſſary for the due execution of the treaty of Paris, that a proper perſon be be licenſed by your Majeſty to ſuperintend the affairs of the Romiſh church.* I cannot help expreſſing with all due ſubmiſſion, my doubts of that neceſſity, (grounded upon the notion formed by general Murray, or by any other perſons of that treaty) being extended to an actual popiſh biſhop and his coadjutor.

Firſt, Becauſe I am informed from good authority, a ſynod of the provincial pariſh

* Article II. of the Report of the board of trade.

prieſts, eſpecially with a dean and chapter at their head, who can name by the eccleſiaſtical law of France a grand vicar to adminiſter to the dioceſe, and who would be more immediately dependent upon your Majeſty than a biſhop, would have been perfectly agreeable to the Canadians; that ſuch a perſon, and ſuch an aſſembly would have regulated the eccleſiaſtical police and exerciſe of the religious ceremonies, to all uſeful intents and purpoſes, ordination excepted. That as the livings are good, and muſt encreaſe with the peace and cultivation of the colony, the Canadians ought not to have thought it harder than the clergy of the church of England, eſtabliſhed in Virginia, and the reſt of our colonies think it to croſs the ſeas: they might be ordained in Portugal, at a Britiſh factory; a conveniency which they have by means of the ſhips, which go thither in ſuch numbers with cod-fiſh: and if there are not Canadians enough to fill up the vacancies, on the ſame being certified by

by the governor to your Majeſty's ſecretary of ſtate for the colonies, every year, any Swiſs Roman catholic clergymen, recommended by the Britiſh reſident in the cantons, might be ſent over to fill the livings; about ſix in a year are judged, on good authority, to be ſufficient. As Romiſh clergy are at preſent imported, it is obvious, that its leſs proper that the biſhop ſhould import them from Old France into the colony, than that your Majeſty's government ſhould export them thither from other parts of Europe.

Secondly, That a biſhop is neceſſary to keep up the doctrines of the political power of the court of Rome is very clear: but not ſo for the exerciſe of the worſhip. In this view, therefore, both the capitulations of Quebec, and Montreal, have rejected the propoſition of a biſhop being continued. And by the ſixth article of the capitulation of Quebec, the biſhop is only *to exerciſe his functions with decency in* the interval,

interval, *until the poſſeſſion of Canada is decided.* This being decided, the inference of the capitulation is, no epiſcopal functions are to be claimed any longer than that interval by virtue of the capitulation. The twenty-ninth article of the capitulation of Montreal, and the province, on the demanding part, admirably points out how the eccleſiaſtical law of the church of France furniſhes the beſt ſuccedaneum for a Popiſh biſhop, by a vicar-general of the dean and chapter, as having the cuſtody of the ſpirituals *ſede vacante*; this article is granted, *that the vicar-general ſhall exerciſe them* accordingly. The thirtieth article was refuſed: and it points out the real view of the eccleſiaſtics who dictated the propoſal. It was a very inſolent and a very dangerous one: *that the King of France ſhould name the biſhop for ever.*

Father Charlevoix ſays, b. ix. p. 406. that after great conteſtations between the court of Rome and that of Verſailles, it was determined that the biſhop of Quebec ſhould hold

hold of and be dependent of the ſee of Rome. However, the biſhop's ſee, in order to unite it with the clergy of France in temporals, was endowed out of the abbey of Maubec: and the abbey of Benevent was united, part to the biſhoprick, and part to the chapter of Quebec. Whether theſe endowments in France are continued now to the biſhop, by the French court it does not appear: nor who named the preſent actual biſhop and his coadjutor to the pope. But moſt undoubtedly in view of the capitulation and treaty, as far as the ſame extend in terminis, I do not conceive that the preſence of thoſe perſons is ſo *neceſſary a caſus fœderis*, but that they may both be recalled by your Majeſty, and moſt certainly the coadjutor, without the breach of treaty; becauſe their eſtabliſhment in the province with ſuch political connections appears to have a manifeſt tendency to keep up a treacherous intereſt independent of your Majeſty, and advantageous to the future views of any enemies

of

of your crown: a danger to which it cannot be the true meaning of any treaty, that your Majeſty ſhould be bound to expoſe yourſelf.

But if, from a ſtate of facts, it ſhould appear, that a tacit permiſſion is more dangerous than an actual royal commiſſion would be with limited powers, either that permiſſion muſt be withdrawn, or it may be enacted, that a perſon may be licenſed by your Majeſty to confer holy orders upon candidates for them, natives of the ſaid colony, and *no others*; (without this reſtriction it is obvious, that he will become an effective popiſh biſhop for all your Majeſty's colonies in America indiſcriminately) that he ſhall be removeable at pleaſure; that ſuch perſons ſhall have the title of your Majeſty's Superintendant Eccleſiaſtical for the Affairs of the Chriſtian Church in Canada; that no other title whatſoever, ſhall be uſed in any public inſtruments; that he ſhall enjoy the revenue

venue, habitation, and other emoluments, as heretofore annexed to the office of biſhop of Quebec, during your Majeſty's pleaſure: that he ſhall not have any delegated perſons under vicarial titles, nor official, nor any other officer of contentious juriſdiction, nor any coadjutor: inaſmuch as ſuch coadjutor has his firſt appointment by the direct authority of the papal ſee.

By the papal canon law, the coadjutor of an actual biſhop of a dioceſe is made biſhop by the Pope's bulls, by the title of ſome ſee in partibus infidelium; and when by illneſs or age, the biſhop of the dioceſe cannot exerciſe his juriſdiction and functions, the coadjutor exerciſes them as if he was actual biſhop. But when the biſhop is capable of acting, the coadjutor has then no more authority than a grand-vicar *.

* Fevret traité d' abus tom. 1. l. iii. c. 4. n. 23. Arret 25 Fevrier 1642. Journal des Audiences, tom. i. c. 89.

It is a fact ſtated, the truth of which deſerves to be enquired into, that a coadjutor or provincial biſhop, Mr. D'Eglis, has already received his bulls from Rome, been conſecrated in France, ſo late as the 12th of July laſt, and is now in actual exerciſe of his functions at Montreal. And it is alſo material to enquire, inaſmuch as according to the laws of France, an oath of fidelity to the French king was neceſſary at his conſecration, and the biſhops in France are directed to regiſter their oaths in the Chambre de Comptes at Paris, whether theſe oaths of fidelity to the French King, have, or have not been taken, both by Mr. Briant, the biſhop of Quebec, and D'Eglis his coadjutor; and whether the ſame have not been diſpenſed with by the Pope, although incompatible with the oaths of allegiance to your Majeſty: if any ſuch are taken to your Majeſty.

It would be proper to be enacted, that no eccleſiaſtical cenſure, interdict, excommunication,

munication, or other puniſhment whatever, ſhall be paſſed or inflicted upon any of the clergy of the ſaid province, unleſs for immorality or neglect of the uſual duties of a pariſh prieſt, articles being firſt preſented againſt him by any of the churchwardens, or two of the pariſhioners, houſholders of the reſpective pariſh of which he is the acting prieſt, to the ſaid ſuperintendant, who ſhall, under his hand and ſeal, certify the preſentation and tranſmit it to the chief juſtice of the court of King's Bench, who ſhall proceed to a hearing thereupon by production of, and proof by witneſſes viva voce, as in other criminal matters againſt the peace; and ſhall fine, ſuſpend, or deprive, abſolutely or pro tempore, as to him ſhall ſeem meet; excepting, that no fine ſhall exceed the value of one year's income of the benefice: but that the whole buſineſs of the ſaid ſuperintendant ſhall be confined to the ordination of the eſtabliſhed clergy of the provincial inhabitants, and to his own proper functions as a prieſt, re-

ſpecting the ſacraments and ſacramentalia, or religious ceremonies thereto belonging.

The leſs objections can ariſe to this reſtriction, becauſe it is ſtated in the Report of governor Carlton, and of the chief juſtice Mr. Hey, *that there was no eccleſiaſtical court in the colony* *. By which I muſt underſtand that there *is no court of an official*; and which, if it means that there *was* none *before the* conqueſt, is a fact very ſingular, becauſe ſuch juriſdiction is incidental to the functions of epiſcopacy; although cauſes teſtamentary and of marriage make a part of the civil juriſdiction in France: and but for that report it would be a fact incredible in any religious eſtabliſhment of powers in church government, eſpecially in the church of Rome.

By the canon law of France the official is an officer appointed at pleaſure by the biſhop, to exerciſe his juriſdiction, which

* Incloſure I. No. 23.

is

is called *contentious*, that is, in civil and criminal cauſes; yet he is ſaid by the French lawyers to be *officier de l'evêché et non de l'evêque*. The voluntary juriſdiction of the biſhop ex gratiâ, is exerciſed by the grand vicaire, as the biſhop's deputy, viz. in the exerciſe of his viſitatorial functions, diſpenſations, inſtitution, licences to preach. The courts of the official in actions purely perſonal, where a layman is intereſted directly or indirectly, are prohibited by the civil juriſdiction; and by the four firſt articles of the ordinance of 1539; and by the *appel comme d'abus*. Criminal caſes, ſuch as rape, &c. which are puniſhable by the civil law of the realm, caſes of damages, even between eccleſiaſtics, are not triable by the eccleſiaſtical courts of France, but by the civil powers.

The fact, taken as ſtated by the chief juſtice, ſhows how infinitely jealous the French government muſt have been of the power of the biſhop, to ſuffer him to have

no eccleſiaſtical court: however, I am much diſpoſed to believe that there is ſomething not clear in the expreſſion of the chief juſtice; for though the biſhop has no court or official, yet I imagine that he acts judicially, or rather *extra judicially*, himſelf *in perſon*, or by his grand vicars-general, which *is ſo much worſe for the provincial* clergy, and province; and which is illegal by the eccleſiaſtical law of France, as the grand-vicars have no contentious nor criminal juriſdiction. For in ſome papers of authority which I have read, a whole village, after having been threatened by one of his vicars to be put under an interdict, upon account of one pariſhioner, it was carried into execution, and with great difficulty the interdict taken off by application to the biſhop, who ſupported his vicar for ſome time. This was a proceeding the more extraordinary, becauſe general interdicts of places and inhabitants are not permitted by the laws of France. In theſe caſes, *l'appel comme d'abus*,

or

or the appeal for a grievance, is allowed: and ſuch an attempt as a general interdict is held to be contrary to the liberties of the Gallician church *.

It is alſo a certain fact, that burial in the church-yards has been denied to Proteſtants.

All the neceſſary authority, ſay the governor and chief juſtice, *for the reparation of churches and the enforcing the payment of tythes by the French government, veſted in the intendant of the province, and this authority*, ſay they, *ſhould be lodged in the governor only, to be exerciſed by him upon principles of political prudence.* The intendant had this power, as repreſenting the King as head of the church in temporals.

The plan of the board of trade ſpeaks of a provincial commiſſary, which office

* Vide Libertés d'Egliſe Gallicane par M. Pithou.

it recommends to be abolished. I take him to be a civil magistrate, because I find no such officer of ecclesiastical jurisdiction in the French law-books.

It seems extremely important to see how far the civil and sovereign power of France restrained the ecclesiastical; because in this province and the other ceded dominions of France, the *same restraining powers may be used by your Majesty, most agreeably to treaty:* and because, if they are not used, the ecclesiastical and sovereign power of the see and court of Rome will be in a more flourishing and formidable condition now since this colony has been ceded to the crown of Great Britain than it was under the French government; which I conceive cannot be permitted by the law or policy of this realm: because it would exceed the treaty, and would admit the whole of the church discipline and government established by decisions of the council of Trent, which never were admitted to be valid in France, and because

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the outward government of the church is by the law of France veſted in the ſovereign, the King being, as the French lawyers ſay, *un veritable evêque au de hors de l'egliſe, comme les evêques ſont les princes en ce qui regarde l'interieur.*

It appears by the French king's commiſſions at the firſt eſtabliſhment of the province, that the power of the biſhop was to be carefally reſtrained * from touching the patronage of thoſe benefices which were in the hands of lay perſons and ſeigneurs. It is ſtated, that the greateſt part of the benefices are now in the preſentation of the biſhop of Quebec; and that the policy of that ſee has been, and is, to

* Vide Arret du Conſeil, d'etat du Roi du 27 Mai, 1699. Ordonne que l'Evêque de Quebec ne puiſſe empêcher les ſeigneurs des paroiſſes et des fiefs, qui en auront commencés d'achever les egliſes, ni même ceux qui auront amaſſé des materiaux, de les conſtruire; les quels jouiront les patronages des egliſes en conſequence de l'edit du mois de Mai, 1679.

put

put all vacant benefices in ſequeſtration, ſo that there are not more than eight or ten clergymen who are actually in full poſſeſſion of benefices; which method gives the biſhop the greater authority over the perſons of the clergy, making them leſs to aſſimilate with the people by frequently removing them from their familiar friends, and flocks, and from one part of the province to the other; ſo that they are always in a ſtate of miſſionaries, under the direction, and dependent upon the will of the biſhop; as ſo many military detached parties under the orders of a general. This muſt be an intolerable grievance upon the Canadian lay pariſhioners, and the perſons of the clergy themſelves, and a proceeding very dangerous to the new governing civil powers. This practice was illegal, even under the French government.

The edict of the French King, May 1699, may be proper to be adopted in part;

part; it runs as follows *. *At the requeſt of divers lords of manors, and inhabitants of New France, it is ordered, that the clergy having beneſices with the cure of ſouls, ſhall be fixed, inſtead of the prieſts and curés who were removeable at the pleaſure of the biſhop;*

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* Edit du Roi, du mois de Mai 1669. (RA. fo. 79. R°.) A la demande de divers ſeigneurs & habitants de la Nouvelle-France, ordonne que les curés ſeront fixés au lieu de prêtres & curés amovibles, & qu'il leur appartiendra les dixmes ſuivant les réglemens du 4 Septembre 1667, & qu'il ſera au choix de chacun curé de les lever & exploiter par ſes mains, ou d'en faire bail à quelques particuliers habitants de la paroiſſe; & que les ſeigneurs du fief où eſt ſituée l'egliſe, les gentilhommes, officiers ni les habitants en corps ne pourront en être les preneurs directement ni indirectement.

Que le ſeigneur du fief ſera preferé à tout autre pour le patronage, pourvu qu'il faſſe la condition de l'egliſe égale en aumônant le fond & faiſant le frais du bâtiment, auquel cas le patronage demeurera attaché au principal manoir de ſon fief, & ſuivera le poſſeſſeur, encore qu'il ne ſoit pas de la famille du fondateur.

Et que la maiſon preſbitériale & cimetiere ſeront fournis & bâtis aux dépens des ſeigneurs & des habitants.

that

that the parochial tithes ſhall belong to them according to the regulations of 4th September 1667, and that every pariſh prieſt ſhall have it in his option either to take them in kind, or to let them to any private perſons, inhabitants of the pariſh; and that the lords of the fief, in which the church is ſituated, gentlemen, officers (civil or military), and the whole body of the inhabitants together, ſhall not be the takers directly or indirectly. That the lord of the fief ſhall be preferred to every other perſon for the patronage of livings, provided he gives an equivalent to the church, by endowment, and payment of the charge of building; in which caſe the advowſon, or right of patronage and preſentation, ſhall remain appendant to the principal manor of his fief, and ſhall follow the perſon in poſſeſſion thereof, although he ſhall not be of the heirs of the founder. That the parſonage-houſe and church-yard, ſhall be provided and built at the expence of the lord and the inhabitants. It may therefore be enacted, that every clergyman who ſhall

be

be nominated by any patron to an eccleſiaſtical benefice, ſhall have therein a complete freehold, as in another eſtate, ſubject only to forfeiture by ſentence of deprivation as aforeſaid, or for treaſon or felony; and that no living ſhall be held by ſequeſtration, unleſs pending a ſuit concerning the right of advocation or patronage, and that by authority of the civil court wherein ſuch right of patronage is tried, and for the benefit of creditors. This is agreeable to the French eccleſiaſtical law *. The ſequeſtrator, or perſon who ſhall perform the office of prieſt while the living remains unfilled, ſhould be elected by the majority of houſholders of the pariſh, and the election to be returned to the court, delivering a copy thereof to the ſeveral parties, and the judge ſhall aſſign him a maintenance.

It is very ſtriking what Charlevoix ſays, l. viii. p. 339. *The famous abbé Montigny*

* Vide lettres patentes, du mois d' Avril 1695, art. viii.

was

was the firſt biſhop of Quebec. The Jeſuits, whoſe inſtitute will not permit them to accept an epiſcopal dignity, were the perſons who thought a biſhop neceſſary in Canada. They were the only prieſts in New France. The pariſh prieſts were merely by commiſſion moveable at the will of the biſhop, and ſometimes of the ſeminary of Quebec, who were themſelves, and are ſtill named by the directors of the ſeminary of foreign miſſions at Paris. Things are but little altered (ſays he) even ſince the court had ordered that the pariſh prieſts ſhould be fixed in Canada, as they are in the reſt of the kingdom. They are very far from being ſo yet. So that as *this whole colony* in its preſent ſtate *is abſolutely a miſſion*, and full of moveable regulars, it will be neceſſary to ſecularize them by act of parliament, although the Pope claims this ſole power. Yet it can be well done, as being conſiſtent with, and *neceſſary to the exerciſe of the Romiſh religion*, inaſmuch as the holding beneficially civil advantages, ſuch as tithes, and things

ariſing

ariſing out of land, is a ſecular or temporal right, being according to the ideas of the Gallican church, not in the interior of the church, but in the exterior power and protection of the ſtate.

It is to be obſerved, that the regular clergy, or clergy profeſſing the rule or regimen of ſome certain order, living in a religious community, and having goods and lands either in full property or in truſt (as the Jeſuits) are in a peculiar manner the inſtruments of power of the court of Rome, being leſs fixed to the ſoil, and leſs connected with the civil power and with the people, than the ſeculars or pariſh prieſts are.

The uſe of theſe regulars in the firſt eſtabliſhments of colonies by Roman catholic governments, has been animadverted upon. It is erroneous to ſuppoſe, as it is ſuppoſed in the fourteenth article of the plan of the board of trade for eſtabliſhment of eccleſiaſtical

ſiaſtical affairs in the province of Quebec, that *the regular prieſts cannot by treaty be excluded from the benefices which are in the patronage of his Majeſty's ſubjects.* But they are, and muſt remain excluded by the canon law, and the rules of their own orders, if they are left in the diſpoſition of the biſhop, for every regular is *ſervus monaſterii*, and can take no property for himſelf, but acquires for his order *: all livings belonging to particular monaſteries are held in ſequeſtration for the monaſtery, and ſerved by their chaplains or vicars; all vicars by the canon law of France are moveable by order of the biſhop.

By the edict April 1663†, it appears that the eccleſiaſtics of Canada were all miſſionaries, removeable at the will of the biſhop,

* Ce qui eſt acquis par l'eſclave appartient à ſon maitre; ce que le religieux acquiert devient un bien de ſa communauté. Vide M. Louvret, Lettre R. No. 42.

† Vide p. 2. printed Edicts.

in

in the firſt ſetting up the colony. So that they were all in fact his vicars, and himſelf the univerſal rector.

The perſons who are properly deſtined in Old France for pariſh livings are the ſecular abbés, who are in a middle ſtate between laymen and eccleſiaſtics, as candidates for benefices having cure of ſouls: and when they are in full orders, and have obtained benefices, they are called ſeculars, as if they were more worldly than the regulars, and more eſpecially than thoſe regulars who form the miſſions, and who profeſs vows of poverty, and hold nothing but as curators in truſt for the community to which they belong; in the ſame manner as the Jeſuits hold for the body aggregate of their order, whereſoever diſperſed, and united under their reſpective head or general who reſides at Rome. Every religious order and congregation or community of ſecular eccleſiaſtics have their general *.

* Pere Thomaſſin, de la Diſcipline Eccleſiaſtique, tom. II. partie iii. liv. 1. chap. xxxvii. No. 1.

This capacity of the regulars to hold benefices is a point which is material as to the fact. For the plan of the board of trade, Article II. propoſes, *leaving the Mendicant Friars, called Recollects, to be continued to ſupply for the preſent the vacant benefices*. But they cannot hold them; as it appears from the nature of their inſtitution.

This propoſition, perhaps, explains the preſent ſtate of diſpoſition of the eccleſiaſtical benefices, in which it is ſaid upon good authority, that the biſhop (who is a native of Britany, and under ſuch oaths as all other biſhops conſecrated in France muſt take upon their conſecration there) does what may prove very dangerous to the ſafety of the Britiſh government; he ſends for his clergy from France, inſtead of preferring the native Canadians, under a ſuggeſtion that there are none fit among the perſons educated in the great ſeminaries there; and that he fixes no clergy in their benefices, but puts all the livings in ſequeſtration. In that way to be ſure they may be ſerved by regulars.

I muſt obſerve, that by the laws of France, the religious who are mendicants cannot be in full poſſeſſion of benefices, having cure of ſouls, not even of a benefice belonging to any regular community: but they may ſerve it by permiſſion of the biſhop. * *The officers of the crown are to diſpoſſeſs them if they hold them, any diſpenſation notwithſtanding.*

The biſhop's power, on the preſent footing, if permitted, becomes immenſe: the ſtate of the provincial clergy reverts to the firſt eſtabliſhment in 1659, when, as Charlevoix ſays, the new clergy ſerved the pariſh only by commiſſion, (b. viii. p. 340.) and all the political inconveniencies

* Les religieux ne peuvent etre curés en titre même d'un benefice regulier, mais ils peuvent le deſſervir avec la permiſſion de l'ordinaire.

Les religieux mendians ne peuvent poſſeder aucun benefice, et il eſt enjoint aux officiers Royaux de les depoſſeder non obſtant toute diſpenſation. Ordonnances de Charles VII. 1443. Libertés Gallicanes c. 7. Tournet Lettre B. c. 41.

follow which have been ſtated, and which the Britiſh civil government would wiſh to obviate. A coadjutor ready to keep up the ſucceſſion; a popiſh biſhop, born, educated, confirmed, and conſecrated in a foreign country, the natural enemy of your Majeſty, bound by no oaths of indiſpenſible allegiance to your crown, open to the temptation of a better foreign ſee upon tranſlation, by the intereſt of a ſovereign who may wiſh in a future war to recover his dominions; form, even in the opinion of ſome of the Canadians themſelves, a center of union, a ſtandard of combined forces, dangerous and formidable to your Majeſty's intereſts, and to the lives and fortunes of your Majeſty's ſubjects.

It muſt be ſtrictly underſtood that the objections here taken are not to abſtract religion, nor to men, but to things; to illegal powers, and to a chain of dependence and connections foreign and hoſtile.

The

The diſtinction taken by the French lawyers, in their writings on the French eccleſiaſtical law, between the authority of the ſee of Rome as the firſt biſhoprick, and of the court of Rome as a ſovereign power, deſerve the greateſt attention here.

It is certainly for the intereſt of the perſons inveſted with epiſcopal authority in the province, to conduct themſelves now in the moſt inoffenſive, and even flattering manner: but the moment hoſtilities ſhall begin between Great Britain and France, they will have the whole province in their hands. The few Britiſh troops ſeparated at a great diſtance; the men becoming almoſt all of them converts to the Romiſh religion, by marrying and dwelling among the inhabitants; Montreal with a wall of earth only on one ſide, not better than an encampment; Quebec without a citadel, (the neceſſity of which is ſtrongly repreſented by general Carlton *) the

* Incloſure, letter to the earl of Shelburne.

works weak and ruined in the late ſiege; twenty thouſand French Canadians, veteran ſoldiers, ready to take arms; are circumſtances full of danger: and there is no retreat, until the arrival of a Britiſh fleet and reinforcements, to ſave the province, or even the lives of the Britiſh ſubjects. Theſe facts being indubitable, as ſtated, one may venture to ſay, in caſe of a war, a marſhal of France with a bâton in his hand, would not be ſo dangerous in the province as a Romiſh native born French biſhop, with a croſs and his coadjutor. The fate of the Britiſh troops and their governor would probably reſemble that of the Auſtrians at Genoa: and one night poſſibly through all Canada might repreſent that of St. Bartholomew, the maſſacre at Paris.

No complaiſance to the zeal of perſons of devout ſentiments in the province, edified by the conſolations of a falſe religion; no temporary facilities of governing by means of a power, which, like

a ſpear,

a ſpear, will pierce the hand which leans upon its point, can juſtify a meaſure, which muſt be weighed in the ſcale of great, legal, and moſt extenſive policy, before it can be permitted, as I conceive, to be adopted in your Majeſty's counſels as a part of the eccleſiaſtical eſtabliſhment of your Majeſty's realms.

There is but one event, very remote indeed and uncertain, which can render the meaſure tolerable: the poſſibility of peace with France for half a century; and that during ſuch an interval, a biſhop of Quebec and his coadjutor, by the influence of due means of conviction, may happen to feel the propriety of conforming to the church of England. Here then the epiſcopacy of the church of England would be grafted on the ſtock of the Roman catholic in America; and a limited eccleſiaſtical power would coincide with the powers of limited monarchy in a province the conſtitution of which, as well as the temper

of the people, is freer than the reſt of the Britiſh American colonies are from democratical principles. This is a conſummation devoutly to be wiſhed for, but little to be expected.

Beſides, the clergy, ſtrictly ſpeaking, called regulars in the ſyſtem of the Romiſh church, there is another kind of regulars who belong to collegiate churches, ſuch as prebendaries, canons regular, &c. Theſe latter, by the Popiſh canon law, can hold eccleſiaſtical benefices with cure of ſouls in full property; they have a rule of order, or regula vitæ directiva, but it is leſs ſtrict, therefore the pope can grant diſpenſations. The caſe of the communities of deans and chapters reſembles the caſes of the Benedictin and Bernardin orders, who do not profeſs poverty, and who are monks rather than *religious:* for there is a great diſtinction in the canon law. Although both monks and religious are regulars, the religious

gious are not monks * but mendicants. The religious (properly ſo called) are to have nothing but victum et veſtitum, and take the vows of chaſtity, poverty, and obedience: (which is the caſe with the Jeſuits.) The Jeſuits and Recollects (conſidered as ſeparate members of their order) are mendicants, by the bull of Pius V. 1571; though the general is not a mendicant, and though the whole order does not actually beg, for which all property is holden by the members. In the orders where the members profeſs poverty, the pope cannot diſpenſe; they can only hold as ſequeſtators or vicars. The rule is *regularia regularibus, ſecularia ſecularibus.* However the pope diſpenſes with this rule, ſo far as to give regular benefices to ſeculars, that is benefices of an inferior order to eccleſiaſtics of a ſuperior, out of compliment to perſons of family and dignity: and ſo the laws of France admit of this diſpenſation;

* Vide Denyſart, word Moines, ſec. 2.

but

but he cannot allow regulars to take ſecular benefices: and leſt this law of the Romiſh church, which is of ſo much conſequence to underſtand the eccleſiaſtical ſtate of Canada, ſhould be doubted, I quote the authority of the canon laws, C. 1. Ext. Cum ad Monaſterium. 6. c. Quod Dei eodem. Vide Arnoldi Corvini de Belderen Juris Canonici, lib. 1. tit. 26. p. 48. Ed. Elzevir, 1672.

If it ought to be one of the principles of the new legiſlation in Canada to ſuppreſs the military and monaſtic ſpirit, and to encourage the commercial, it cannot be conſiſtent with the principles of the latter to keep up the convents of women any more than thoſe of men, under any notion * of ſuch inſtitutions being a neceſſary proviſion for daughters and younger ſons of the ancient nobleſſe of the province. The ſpirit of monachiſm and military ſervice

* Report of the ſollicitor-general.

have

have gone hand in hand in the feudal hiſtory. It is unhappy for mankind that there remain ſo many traces of it.

I am well informed that the nobleſſe by patent are without titles, and generally without lands, numerous, and poor *: but elevated above trade, which is ſuppoſed to have diſgraced the anceſtors of thoſe who acquire theſe patents.

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* Les arts ſedentaires de la paix, les travaux ſuivis de l'agriculture ne pouvoient pas avoir d'attrait pour les hommes accoutumès à une vie plus active qu'occupée. La cour, qui ne voit ni ne connoit les douceurs et l'utilité de la vie ruſtique, augmenta l'averſion que les Canadiens en avoient conçu, en verſant excluſivement les graces et les honneurs ſur les exploits guerriers. La nobleſſe fut l'eſpece de diſtinction qu'on prodigua le plus, et qui eut des ſuites plus funeſtes. Non ſeulement elle plongea les Canadiens dans l'oiſivité, mais elle leur donna encore un penchant invincible pour tout ce qui avoit de l'eclat. Des produits qui auroit dû être conſacrès à l'amelioration des terres furent prodigués en vaines parures. Un luxe ruineux couvroit une pauvreté réale. Hiſtoire Politique. Tom. vi. p. 157.

The

The moſt diſtinguiſhed perſons in Canada (for they cannot be called noble in the ſame ſenſe as we uſe the word nobility in England, but rather as yeomanry, or country gentry) are the poſſeſſors of fiefs, or lords of manors with patents of nobility. There are not any real ancient French nobility *with titles* in the province.

It appears, No. II. Appendix of the Incloſure of the board of trade, that the nobility reſident in the province, amount by general Carlton's account to ſeventy-ſix who have ſerved as military, and forty-four who have never ſerved; they almoſt all are, as I underſtand, by patent, and very few by the right of their fiefs, as being noble fiefs, that is to ſay, as having a juriſdiction * in civil matters (ſomething like our court-barons or court-leets) and in criminal alſo attached to them; for they cannot exerciſe

* Vid. Tit. Fiefs, tit. 2. p. 7. printed Abſtract of the cuſtom of Paris.

their

their juriſdiction as ſeigneurs unleſs they have patents of nobility.

It is the miſery of theſe patents, that they diffuſe the rank of nobility to all female, as well as male deſcendents; ſo that in the time of Lewis XIV. who made great uſe of theſe patents to recruit his troops, there were fifty thouſand † noble families. He found it neceſſary at the end of his reign to ſet up a judicial enquiry into the titles of nobility; and many were declared invalid. But they have encreaſed again to double the number in ſucceeding wars upon the ſame military principles. The few ſeigneurs having noble fiefs and patents have dropped the exerciſe of their juriſdiction in Canada ever ſince the conqueſt, on account of expence; and of their never having done fealty and homage,

† Vide the Abbé St. Pierre Annales Politiques de ſon ſiecle; an author of great credit and authority.

which

which the governor would not accept. Thus the very few perſons who before the conqueſt ever exerciſed that right, being about three or four ſeigneurs, were prevented from uſing it. The value of theſe moſt noble ſeigniories is ſtated to be about eighty pounds a year, in the preſent ſtate of cultivation. If they were doubled or trebled, this nobility would be very inconſequential.

As to the patent military nobleſſe without property, they are very dangerous perſons to ſtay in the colony. They have loſt every thing, and have nothing to hope under your Majeſty's government. Theſe fiefs and ſeignories, as general Carlton ſtates them, like their nobility by patent, are diviſible ad infinitum.

It muſt be detrimental to the province to maintain theſe conventual inſtitutions, with a view to the nobleſſe or any other perſons or objects, as places of education for

for either ſex. Convents form the worſt of ſchools; being only nurſeries of bigotry, ignorance, idleneſs, and averſion to the civil power. It is ſufficient alſo to ſay in point of morals, that a conventual life is an unnatural ſtate; and the profeſſion of vows renouncing marriage, or a ſolemn obligation not to continue the human ſpecies, is ſo far from virtue or religion, that it is a crime againſt the ſtate, which it deprives of ſubjects; and productive of ſecret vices, which are the diſgrace of human nature.

That nuns, as it has been urged *, are neceſſary for attending the hoſpitals, is not a fact, for they may doubtleſs have other nurſes; I do not comprehend that it is neceſſary that a young man who is partially ſick ſhould be attended by a woman who is devoted to a ſingle life: nor do I conceive that widows and married women

* Vide M. Lotbiniere, Art. LXXIII.

are

are leſs proper to aſſiſt in theſe charities; and to ſit up all night at a bedſide, than a woman who is young, and who is ſuppoſed not to know the eſſential difference of the ſexes. Widows and married women may devote themſelves to an attendance upon the ſick, if they pleaſe, upon principles of religion; if they do not, it appears to me, that public government ought to pay the expence of nurſes and matrons, and not ſuffer the eſtabliſhments of religion and charity to be turned into a convenience for vice.

There are ſufficient precedents that the royal authority in France has ſubjected the admiſſion of members in the religious communities to ſuch reſtriction as the Sovereign thought proper. Declaration du Roi, 10 Fevrier 1742, regiſtered in the grand council 2d March, and in parliament 29th January 1745. By the royal edict, March 1768, not only the numbers of monaſtic houſes in Paris, and cities and towns

towns in the French dominions are reſtrained, but the numbers of perſons to be admitted are alſo limited *. Some monaſteries have been ſuppreſſed; and the remaining members ſent to lodge in other religious houſes, where there was a vacancy in the number of members. By the Capitulaires of Charlemagne, agreeable to a law of the emperor Valens, no perſon could be admitted to take the vows without the licence of the prince. Many other Roman catholic Sovereigns and ſtates have exerciſed this reſtrictive authority, and have alſo ſuppreſſed many religious houſes, without waiting for the death of the members.

The ſame law of France which acknowledges in the ſovereign a power to prohibit the eſtabliſhment of any community, or other religious houſe, without his permiſſion, by conſequence acknowledges his

* Art. 9, 10.

power to forbid any other members being admitted into the communities, or religious houſes, already eſtabliſhed, and which were originally ſet up by the act of royal authority. Suppreſſion and diſſolution follow of courſe from the prohibition of new members. It may be enacted, therefore, *conſiſtently with the law of France, and therefore without breach of the treaty*, or the law of nations, and without cruelty to the preſent parties, that no new members ſhall be admitted into monaſteries or convents in the province of Canada; but that all thoſe monaſtic communities, *after the death of the preſent members*, ſhall be declared to be *diſſolved*, *ſo* as no longer to be *conſidered as communities or corporate bodies having legal eſſence:* and that the preſent members of the communities of prieſts ſhall be declared to be capable, although regulars, by virtue of an act of parliament, to hold in their own right the ſeveral eccleſiaſtical beneficies having cure of ſouls, being thereto preſented by the reſpective patrons,

patrons, without any farther form of inſtitution or induction being neceſſary.

Inaſmuch as by the eccleſiaſtical law of France, the King is the head of the national church, in all external and temporal matters, as well as protector thereof in ſpirituals, the houſes, lands, effects and revenues, of the ſaid ſeveral communities, whether of men or women, profeſſing the rule of any order of the Romiſh church, may be declared to be immediately veſted in your Majeſty, your heirs, and ſucceſſors, in order the better to preſerve the property of the ſame, for the uſe and greater benefit perſonally of the preſent actual members thereof, and be made a part of the receipt of the revenue of the ſaid province, receivable and accountable for by your Majeſty's receiver-general, under the title of the Church Revenue of Canada and Quebec; for the purpoſe of applying the ſame in the following manner; to ſupport the reſpective hoſpitium, or religious houſe, and

to pay the uſual penſions, with benefit of accruing and ſurvivorſhip, until one half of the members of the ſaid communities ſhall depart this life; and from and after that time, to divide the ſurplus, without farther benefit of accruing or ſurvivorſhip, among the men or women of the ſaid convents, during the life of any ſuch perſon, ſo long as he or ſhe ſhall remain in the province; and notwithſtanding that he or ſhe ſhall be otherwiſe provided for, the men by marrying, or accepting any eccleſiaſtical benefice having cure of ſouls, or any lay office, civil or military, or the women by marrying, or quitting the convent of their own free will; provided that no new member ſhall be hereafter admitted, or entitled to any penſion or benefit, but ſuch only who were admitted previouſly to the time of the capitulation; or who are members ſince admitted, and now reſident in the ſaid religious houſes, or within the province at the date of this act. No perſons being

being ſtrictly entitled to the benefit of the capitulation and treaty, but ſuch perſons who were objects of them, reſident in the colony at that period, in the words of the treaty, *as inhabitants who had been ſubjects of the moſt Chriſtian King, and who had leave to retire.* And, agreeably to the ſpirit of the thirteenth article of the board of trade, for the further purpoſe of teaching ſchool, and endowment of any churches, which hereafter may be built by licence of the chief governor of the province for the time being, and for the augmentation of the livings of ſuch pariſhes as ſhall become more populous, and are not already ſufficiently endowed; and for the building and repairing of the houſes of the clergymen and pariſh churches without burthen to the pariſhioners, as to the ſaid governor for the time being ſhall ſeem meet; alſo for the maintenance of any ſeminary which may be held neceſſary, for the purpoſe of general education of Canadian Britiſh ſubjects in uſeful learning without

diſtinction of religion. Alſo for ſuch other purpoſes of public education, or the relief of the province, as in your Majeſty's great wiſdom ſhall hereafter be ſet forth, or found to be neceſſary or uſeful: power always being reſerved to your Majeſty to grant any of the ſaid eſtates of eccleſiaſtical bodies, for the rewarding any commander in chief, or other officer, or ſoldiers, concerned in the conqueſt of the ſaid province, or others of your Majeſty's faithful ſubjects and ſervants, for their public ſervices.

Part of the fourteenth article of the plan for the eſtabliſhment of eccleſiaſtical affairs, ſeems proper to be adopted, viz. *that none but* natives of the province of Canada *ſhall be appointed to any eccleſiaſtical benefices in the ſaid province*, with this proviſo, that native born Canadians can be had, who are capable of the eccleſiaſtical offices, in ſpirituals and of the civil and temporal benefits attached to them by the ſtate. That no miſſionary clergy whatſoever ſhall

be

be ſent among, or continue with the Indians, without being licenſed by the governor of the ſaid province; and ſuch miſſionary ſhall write an account to him monthly of what paſſes. Their names ſhall be regiſtered.

As it is ſaid upon good authority, that the preſent titular biſhop is himſelf a native of Britany, and is underſtood to give great encouragement to native French prieſts to come into the province, which, if true, is very dangerous to the intereſts of this realm, it may be proper to be enacted, that no foreign born prieſt, of the popiſh perſuaſion, ſhall come into the ſaid province without licence of your Majeſty, under pain of attainder; nor ſhall any foreign born perſon receive popiſh ordination, or have any benefice, or being ordained, ſhall remain in the ſaid colony without ſuch licence. That in caſe the patrons of the reſpective benefices ſhall not preſent their prieſts within ſix calendar months after a vacancy, the ſame ſhall lapſe to the nomination of the chief juſtice of the ſaid province; and in

default of his preſentation in ſix months, the ſame ſhall lapſe to the governor, as repreſentative of your Majeſty.

Whereas marriage and children are the ſtrongeſt pledges of fidelity which can be given by any man for maintaining the civil government under the protection of which he lives; and whereas marriage is held by the church of Rome to be a ſacrament, and to confer grace effectual, and ex opere operato, and that the ſame is to be ſo held as an infallible article of faith, according to the opinion of the church, and the decree of the council of Trent, in the words of cardinal Navar (l. iv. Concil i. nu. 3.) and ſacraments are, according to St. Auguſtine *, viſible ſigns of an inviſible grace; and to be equal to the effect of a divine myſtery; and it is agreed by the Canoniſts, that marriage is as much a ſacrament as the taking holy orders, only

* De Civ. Dei, c. 5. &c.

that

that they are both voluntary in the act, and not *of indiſpenſible neceſſity to ſalvation*; there cannot be a greater abſurdity, than that the later prohibitions of that church ſhould refuſe a ſacrament of ſuch grace and efficacy to their clergy*; therefore it may be proper to be enacted, that all the civil rights and privileges of marriage ſhall be communicable, and are communicated to all perſons of every denomination, eccleſiaſtical as well as laity, except that no woman under twelve, or man under the age of fourteen years, ſhall marry, or contract in marriage. And as the maintenance of the parental authority is of the utmoſt importance for ſubordination to the ſtate, as well as the increaſe of people, and propagation of a ſtrong and healthy race, according to a due courſe of nature at an age which is proper, be it enacted, that no perſon ſhall marry, if a

* Vide Corvini de Belderen, Aphoriſmi Juris pontificii. Tit, De Sacramentis. De Nuptiis.

female,

female, under the age of eighteen, or a man under the age of twenty-one, without the conſent of the father; or if no father, then of the neareſt of kin in blood of the party or teſtamentary guardian, ſuch conſent being ſignified publicly in writing, or otherwiſe in full congregation of the pariſh church, and entered in a book by the miniſter thereof. And that all marriages, births, chriſtenings, and burials, be duly regiſtered by the pariſh prieſt, or perſon officiating for him, under a penalty of deprivation and baniſhment, for omitting, and of felony in any perſon who ſhall falſify, or eraſe, or ſubduct the ſame.

With regard to the regiſtering of marriages, the ſecond article tit. xiv. of the Abſtract of French Law may be adopted, but with a greater penalty. This article is very improperly placed under the Title *De Teſtaments*.

It

It would alſo be proper to introduce the prohibitory law of England, reſpecting the degrees of blood, on account of uniformity between the ancient and new ſubjects of your Majeſty; but particularly to prevent in families the unhappy conſequences of diſpenſations, uſual in the Roman catholic countries, for a man to marry his own niece, or others as near of blood, which marriages would be void ab initio, for inceſt, as I conceive, if the parties claimed any thing under them in the reſt of your Majeſty's dominions.

It ſeems the more neceſſary to make ſome regulations touching marriage, becauſe in the printed abſtract of the French laws there is no title of marriage whatſoever, otherwiſe than as the law relates to the effects of marriage upon the property of the contracting parties with reſpect to each other, and their children, under the title of *Communauté*; although marriage is a ſubject of the firſt conſequence to the ſyſtem in every

every code of law, and upon which ſo many other civil rights and relations are depending.

As the popiſh biſhop and clergy will certainly refuſe to perform the office of marriage between any Religious diſpoſed to ſolemnize it; and may alſo refuſe it between Proteſtant and Roman catholic; the alternative, of marriages before a magiſtrate, as propoſed by Mr. Mazeres, would be neceſſary. If Roman catholics are juſtices of the peace, here again would be a ſtop; excepting the parties chuſe to be married according to the rites of the church of England, or that the governor, judges, attorney-general, or other of his Majeſty's officers, of eminence in the colony, and even notaries, ſhould have in general the power to make marriages valid, contracted before them with certain ſolemnities, and to regiſter the ſame.

The ſeventeenth article of the plan of the board of trade, that no monaſtery, convent,

vent, or church, or conſecrated place, ſhall be a ſanctuary for criminals, is already anſwered, by eſtabliſhing the criminal law of England.

The tenth article of the plan of the board of trade may be proper, if adopted, to be enlarged. *The propoſition is, that the chapter of Quebec, conſiſting of a dean and twelve canons, ſhall be aboliſhed as entirely uſeleſs.* This immediate abolition may take place conſiſtently with the capitulation of Quebec; there is no ſaving in it of the property of this eccleſiaſtical body: nothing is granted but the ſafe-guards of the perſons. The eccleſiaſtics of this body have only a right by the treaty to retire, and to ſell their eſtates; therefore if it is enacted, that the nomination of the dean and canons is veſted in your Majeſty, (as in the caſe of the vacant benefices heretofore in the patronage of the biſhop is propoſed), and that the places of the ſaid dean and canons ſhall not be filled up when

when they become vacant, the chapter will be diſſolved of courſe. But it deſerves to be conſidered in policy, whether as this chapter is much more harmleſs than a biſhop, or any of the other religious orders, it might not be uſeful, by taking away from them all eccleſiaſtical juriſdiction, if they have any, excepting by fixed ſtatutes over their own body, to keep up the deanery and canonries; in order that theſe preferments may be douceurs in the hands of government to engage the hopes, and to reward the fidelity of ſuch of the ſecular clergy, as ſhall be diſtinguiſhed for their fidelity to your Majeſty.

As there are chapters which are regulars, as well as ſeculars, and it does not appear of which the chapter of Quebec is compoſed (but I imagine it moſt likely to have been formed of regulars, for the encouragement of miſſionaries who always are regulars) it may be right hereafter to confine

confine the nomination of the dean and canons to ſecular and parochial prieſts only, and that the governor ſhall nominate to the ſame in right of your Majeſty.

According to Charlevoix, b. viii. p. 342. the chapter of Quebec is compoſed of a grand chanter, a grand archdeacon, a theologal, and twelve canons. The King of France named to the two firſt dignities, the biſhop named to the reſt: whether they had any peculiar and local juriſdiction ſeparate from the biſhop's does not appear. I underſtand that their revenues are very ſmall: but their dignities are deſirable, in point of honour, among the clergy. But if the eſtates, effects, and revenues, of the ſaid community, ſhall be veſted in your Majeſty, and for the ſame purpoſes as in the caſe of the other religious communities, the preſent dean and canon being paid their reſpective ſhares during their lives, and no new members admitted, their diſſolution will

will follow, and then the building, uſed partly as a cathedral in Quebec, and partly as a pariſh church, which appears heretofore to have been partly under the direction of the biſhop and dean and chapter, and partly under the direction of the churchwardens and pariſhioners, may be repaired by a tax to be laid upon the pariſhioners, and be hereafter conſidered entirely as a pariſh church for the uſe of the pariſhioners, under the direction of the churchwardens only.

The ſpirit and letter of the eighteenth article of the plan of eſtabliſhment, propoſed by the board of trade, ſeems proper to be adopted, touching correſpondence, &c. It may therefore be enacted, according *to the terms* of the ſaid *article*; and farther, that if the ſuperintendant of eccleſiaſtical affairs, or any other perſon, ſhall procure, uſe, or make public, any diſpenſations, bulls, excommunications, ſuſpenſions,

ſions ab officio vel beneficio, or any other inſtruments or acts of authority, from any prince or potentate, eccleſiaſtical or ſecular, other than from your Majeſty, ſuch perſon ſo offending ſhall be baniſhed from the ſaid province, and be made incapable of all civil rights and benefits whatſoever, in any part of your Majeſty's dominions, and in caſe of returning into the ſaid province ſhall ſuffer death: ſuch offence to be proſecuted at the ſuit of any perſon informing, at the expence of the crown by your Majeſty's attorney-general in the court of King's Bench of the ſaid province.

This reſtriction propoſed with regard to the bulls of the court of Rome, is exactly conſonant to the French arret of 28th September 1731, which forbids all archbiſhops, and biſhops, and all others, to receive, make, read, publiſh, or execute, any bulls, briefs, or inſtruments of the

court of Rome, without letters patent of the king regiſtered in parliament *.

I recommend, in caſe of delinquency, the baniſhing the ſuperintendant or other eccleſiaſtic from the province, rather than impriſonment, as propoſed in the forty-fifth article of the printed heads of a bill for tolerating the Roman religion. Becauſe I am of opinion that a popular biſhop or eccleſiaſtic impriſoned, may occaſion a revolt; or, that after his releaſe and diſgrace he will prove a perſon exceedingly dangerous, from his influence and reſentment, to remain in the province.

Agreeably to the ſpirit of the twentieth article of the plan of eſtabliſhment propoſed by the board of trade, *no pomp or proceſſions in the roads or ſtreets ſhall be uſed by*

* Vide Arret, 26th Feb. 1768, ſuppreſſing a brief of pope Clement XIII. 13th Jan. 1768. Vide Arret, 28th September 1731.

any

any eccleſiaſtics, nor ſhall any eccleſiaſtical perſon uſe any other habit than ſuch as is uſed by the abbés in France, except in the time of divine ſervice. And that all perſons offending herein ſhall be informed againſt as above, and be ſubject to fine or baniſhment, at the diſcretion of his Majeſty's chief juſtice of the ſaid province.

In the ſixteenth article of the plan for eſtabliſhment by the board of trade, it is propoſed, *that your Majeſty, and your royal family, ſhall be prayed for, according to the forms of the Romiſh church.* This article is not ſufficient to anſwer the purpoſe intended; namely to inſpire the Canadian ſubjects with a ſenſe of loyalty: for the form of the Romiſh church is manifeſtly not underſtood in the ſaid article. For the fact is, that the mode of the church of Rome in its ritual, and in every maſs book uſed in the dominions of your Majeſty, is to pray firſt for the pope, and next for the King, without naming him; and which

mode both inſinuates inferiority of dignity and power in your Majeſty; alſo that another pretended King may be intentionally and conſcientiouſly prayed for; ſo that ſuch a ſort of prayer has a manifeſt evil tendency, and it would be much leſs injurious to your Majeſty, that no prayer at all ſhould be uſed for the King, rather than in terms ſo derogatory to your Majeſty's honour: wherefore I am of opinion that it is of great political conſequence that this mode of praying ſhould not be tolerated, but that an eſpecial prayer be formed and uſed in the French language; and (not to break in upon the order of the maſs) that this prayer ſhall be immediately uſed as an introduction, before any other ſervice ſhall be begun; in which prayer no prelate or other potentate ſhall be prayed for, but your Majeſty by name, the Queen, the Prince of Wales, and the reſt of the royal family, with a ſuitable preamble, in order to impreſs the minds of the people, and to inculcate an idea of ſubjection to your Majeſty

jeſty alike in all orders of men, both clergy and laity.

It is right to ſubjoin here the form of the preſent prayer univerſally uſed at maſs in England, that the impropriety of it in point of decorum towards every crowned head in the world, as well as the equivocality of it, may appear perfectly clear. The prayer at maſs is: *Lord have mercy upon us, and defend thy ſervants, N. our chief biſhop, our King, Queen, as here preſent, and all Chriſtian people from all adverſity, always, and in all places; grant peace and proſperity in our time, and preſerve thy church from all wickedneſs, through our Lord Jeſus Chriſt, thy Son, who lives and reigns one God, with the Holy Ghoſt, and thee, evermore, Amen.*

Inaſmuch as the uſe of the Latin language, ſince it has ceaſed to be a living univerſal language, is not now eſſential to the exerciſe of the worſhip of the Romiſh

religion, but that the obſervance of the rites and ceremonies thereof can be as effectually preſerved in the language of the people among whom the ſame are uſed: it may be enacted, that any prieſt who ſhall chuſe, at the requeſt of the major part of his pariſhioners, to ſay maſs in the French tongue, ſhall not be reprehenſible by his eccleſiaſtical ſuperiors in any way for ſo doing; nor ſhall any perſons be reprehended for reading the holy Scriptures in the French or Engliſh languages.

That the inhabitants, and clergy in particular, may have always before their eyes ſomething to remind them of their dependence upon your Majeſty's protection, and may reverence your authority, it will be proper that your Majeſty's arms, as it was done by Queen Elizabeth at the time of the Reformation, ſhould be placed in the moſt conſpicuous manner in the churches, over the pulpit, or entrance leading from the nave of the church into the chancel or choir; and that the governor ſhall take care

care to have the ſame executed in a proper manner. Alſo, that your Majeſty's arms, carved in ſtone, be placed over the gates of the city of Quebec, Montreal, and all other fortreſſes, magazines, in the market-place, colleges, hoſpitals, town-houſes, and all other public buildings whatſoever.

As the pope's abſolution of oaths deſerves a peculiar attention from your Majeſty's government, being a moſt dangerous power; and as it is a peculiar tendency of the Romiſh religion to make men depend more upon ceremonies than good actions, and on the pardon of the church, depoſited in the hands and *intention* of the prieſts, ſo it is a fact well aſſured, even by one of the Canadian clergy, that the great vice of the Canadians is a contempt of falſe ſwearing; I muſt obſerve, that the diſpenſing power of oaths taken *in Canada* by any eccleſiaſtical perſon ought to be guarded againſt by eſpecial words, as the word *this realm* is ſo equivocal. The commiſſion of the governor has much too

great a latitude, by leaving it to his *diſcretion, as he ſhall think fit, to tender the oaths of the 1 George I. to every ſuch perſon as ſhall paſs into, or be abiding in the ſaid province.* This *diſcretion* ought to be more ſpecial, for the ſafety of the province, and for preventing more miſſions. I make no more remarks upon the wiſdom of a commiſſion which diſpenſes with the oaths of allegiance to your Majeſty.

As the diſſolution of the preſent monaſtic communities may not prevent more being ſet up in a future time; becauſe under the notion of ſchools and ſeminaries of learning, or hoſpitals for public charity, enthuſiaſtic or weak perſons may be induced to make deviſes of their lands or effects in mortmain (a term equally known in the French law as in our own) it may be enacted, that all ſuch deviſes ſhall be void; as well as all ſuch ſchools, ſeminaries, and hoſpitals be deemed unlawful, and forfeited to the crown, unleſs perſons ſo deviſing ſhall in their life times, not being confined

confined by any ſickneſs, obtain licence from your Majeſty to make ſuch deviſes; and unleſs ſuch ſchools, ſeminaries, or hoſpitals ſhall be kept, ſet up, built, or maintained in conſequence of your Majeſty's licence; and that ſuch licence ſhall not be applied for until the intention of applying for the ſame, with a deſcription by whom, and for what purpoſe, and with what rules and endowments, or funds for ſupport thereof, ſhall have been made public for the ſpace of three months in the Quebec Gazette, in order that every perſon intereſted may ſhew cauſe to the governor in the ſaid province, why the ſame ought not to be granted: and that no licence ſhall be granted by your Majeſty, unleſs the governor of the ſaid province ſhall certify that the ſaid ſchool, ſeminary, or hoſpital is ſo regulated and endowed, that no detriment can ariſe from thence to your Majeſty and the province; alſo, it may be proper that the governor of the ſaid province may at all times viſit, regulate, and

controul

controul every ſuch ſchool, ſeminary, and hoſpital, as the repreſentative of your Majeſty, upon any complaint made, or upon his own view, in a ſummary way, and without further reſort.

In ſupport of the reaſonablneſs of this regulation, I cannot do better than refer to the ſeveral laws of France touching the religious orders, and gens de main morte; particularly to the paper in the Incloſure, printed by order of the council, p. 31. and the abſtract of the Loix de police, Declaration du Roi, 25th Nov. 1743. It there forbids the eſtabliſhment of any community, or other religious houſe, without the royal permiſſion: forbids any perſon to lend to ſuch ſocieties his name in truſt, under a penalty of ten thouſand livres: forbids any perſon to deviſe by will any effects of the nature deſcribed. And there is another Declaration of the 25th Nov. 1743, in the printed Abſtract of Edicts, p. 12. By this declaration, the religious,

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and gens de main morte, *eſtabliſhed in the French colonies*, are not to form any freſh communities, (they are not to encreaſe their members) without the King's permiſſion, and it forbids all notaries and other officers of the law to paſs, execute, regiſter, or receive in favour of theſe communities, or people de main morte, any contracts of ſale, exchange, donation, ceſſion, transfer, or other act neceſſary for the having and holding ſuch effects and eſtates as are therein recited; alſo, no contracts for creating rentes foncieres, that is, rents chargeable upon lands irredeemable (which by the French law is conſidered as land); nor rents of conſtitutions upon particulars; by which is underſtood intereſt chargeable by contract upon the perſon and his goods which are redeemable. But the moſt extenſive edict for reſtraining monaſteries or other ſocieties in main morte, is the famous edict of 1749. In certain caſes it makes their acquiſitions to eſcheat to the crown, and to be reunited to the domaine.

Whereas

Whereas it is of the utmoſt political importance to preſerve the eſtabliſhment of the Romiſh religion, *under theſe modifications*, which ariſe not only out of reaſons of general policy, of which the laws of France are a proof, but without which I do not conceive the exerciſe of the Romiſh religion can be tolerated with ſafety to your Majeſty and the realm, or conſiſtently with the fundamental laws thereof; the *means* of ſupporting the ſaid toleration, by ſupporting its neceſſary reſtraints and boundaries are therefore to be conſidered; for this purpoſe it is conceived it will be proper to look back to the means adopted by the reformers of the church in England. The grants made of the church lands and tithes, inſtead of keeping them for the ſole and perſonal uſe of the ſovereign, which would have been odious, was a meaſure full of great political wiſdom. The paſſing of the eſtates of the religious communities upon their diſſolution, and tranſferring other eccleſiaſtical poſſeſſions, even

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the biſhop's part, into lay hands, and part out of one eccleſiaſtical hand into another eccleſiaſtical hand, to make good when the eſtates of the latter had been granted into lay hands, was a meaſure which created a new chain of dependence. Every eccleſiaſtic who had loſt on one ſide, but who had gained an equivalent on the other, was afraid of the return of that ſyſtem, which would occaſion a reſtitution in integrum to the firſt loſers. The ſecular clergy, or thoſe of the new eſtabliſhment, juſtly feared that they ſhould never be able to recover from the nobility and laity the eſtates which had been taken from them, viz. from the clergy who remained eſtabliſhed, and who now had their loſs ſupplied in a certain degree out of the eſtates of the regulars, who were entirely diſſolved. Nobility, laity, biſhops, rectors, vicars, every beneficed prieſt accordingly held faſt their new grants and endowments; and even when the Romiſh religious ceremonies exiſted ſtill as the national ritual, yet the

reformation

reformation was begun: the power of the ſee of Rome was effectually removed; and a guaranty of the gradual and governing new ſyſtem of religion was ſo firmly eſtabliſhed, that nothing but a total revolution again of all the rights of property, and of all the forces which ſupported thoſe rights by manutention and the ſword, could overturn the new ſyſtem of the power of the crown, now declared to be ſupreme in all cauſes eccleſiaſtical as well as civil. No bonds could be imagined more effectually to raiſe the edifice of the new church government upon a rock than theſe meaſures. The great ſprings and ties of human actions are intereſt and property. The conſequence of them is dependence.

It may be thought right therefore in theſe views of policy, in caſe of the deanery and chapter of Quebec being hereafter diſſolved, and all the other religious communities, *as it is propoſed in the plan of the board of trade*, for the crown to avail itſelf thereof,

thereof, agreeably to the ſpirit of the conduct above deſcribed at the Reformation, in the mode hereafter to be propoſed, or in ſome other; the following facts being firſt conſidered.

The former and preſent ſtate of the clergy in Canada appears to be as follows, from an account of Mr. Veyſſiere. The ſecular clergy of the province of Canada in the time of the French government, and in their firſt eſtabliſhment there, had all of them glebe lands, and the tithes of their reſpective pariſhes, both great and ſmall; alſo mortuaries, money for maſſes, and all other eccleſiaſtical profits ariſing and accuſtomed for the performance of religious rites. Theſe advantages made the livings conſiderable. The whole number of pariſhes are one hundred and twenty-eight; one of which is worth about five hundred pounds ſterling; another about three hundred and fifty pounds; two or three more from about two hundred pounds to two hundred

hundred and fifty pounds; and many to about one hundred and twenty-five pounds. Of a dozen of theſe livings the ſeigneurs or lords of manors have the advowſon; the reſt (too many) are in the gift of the biſhop; and the patronage of the former, as appears by the French commiſſions, have been acquired by the ſeigneurs granting glebe lands, or building the churches. The mode of ſequeſtration has already been animadverted upon. La Valiere, a former biſhop of Quebec, carried his paſſion for power ſo far, that he even reſiſted the repeated orders of the court of France to the contrary, which conſidered this conduct of putting livings in ſequeſtration as a breach of the eccleſiaſtical conſtitution of that country, and a grievance juſtly complained of by the clergy of the province. Therefore it is conceived, that if the ſuperintendant is to be confined only to the buſineſs of ordination, it will be a neceſſary and moſt effectual method of preventing this tyranny over his clergy,

to

to declare the patronage of all eccleſiaſtical benefices, heretofore in the gift of the biſhop, and dean and chapter, and of all other eccleſiaſtical perſons or communities, to be veſted *in your Majeſty only*; ſaving the right of the ſeigneurs and lay patrons. That the benefices heretofore in the gift of the biſhop, are ſo veſted already cannot be doubted in law, becauſe *there being no biſhop by law* the patronage of the ſaid benefices is devolved to your Majeſty's crown of courſe.

It ſeems to be pretty clear, that any religious communities, who, as principals at the time of the conqueſt, were not inhabitants, reſident in perſon, do not fall under the privilege of the capitulation, nor come within what is termed by the civilians, the caſus fœderis, ſo as to retain the property of their eſtates under it; becauſe they were not then the local objects to whom, as a perſonal conſideration for ceaſing their reſiſtance, and on account of their particular

courage or diſtreſſes, the conquerors granted terms of eſpecial favour; neither could they *retire* according to the treaty; and if they could not retire, they could not take away their perſons and eſtates; therefore, if it is true in fact, that any eſtates are *now* held under the grants of foreign religious communities, either in under-tenancy, or in truſt for them, or by deputation, ſuch as the Jeſuits and the eccleſiaſtics of the ſeminary of St. Sulpice at Paris, that fact is very important. The community of the latter, are the temporal lords of the moſt fertile part of Canada, and a city dedicated to the Virgin Mary; they have an influence there equal to the power of the Italian clergy in the ſtate of the church, or Campagna di Roma.

The pariſhes in the iſle of Montreal and its dependencies, ſays Charlevoix, b. viii. p 340. *are ſtill upon the ancient footing of moveable prieſts, and under the directions of the members of St. Sulpice.* They poſſeſs a fine and improving eſtate of eight thouſand pounds

pounds ſterling a year at Montreal, and which will in a few years be worth ten thouſand pounds. If all the facts are clearly eſtabliſhed, as ſtated, it is a great queſtion of law, whether theſe eſtates are not now fallen to your Majeſty, of whom the under-tenants and poſſeſſors muſt be intended to hold them, as truſtees for ſuch uſes as your Majeſty ſhall declare.

It is in proof by ſeveral deeds of eſtates (it is immaterial whether before or after the conqueſt) that the Religious living in the ſeminary of Montreal are merely negotiorum geſtores, they are ſo deſcribed in ſeveral inſtruments of conveyance, which Mr. Mazeres has peruſed in the courſe of buſineſs. Theſe conveyors are ſaid to be *Fondez de la procuration de Meſſrs. les eccleſiaſtiques du ſeminaire de St. Sulpice à Paris.* It appears, according to Mr. Lothbiniere's own words*; *that before the conqueſt, the ſeminary of St. Sulpice at*

* Printed paper, article lxvi.

Paris, was a voluntary partnerſhip among a number of clergy at Paris, who had engaged together in buying and ſelling; that the joint houſe at Montreal had a ſhare in the joint houſe at Paris, in a ſort of mercantile way, and an open account. That after the conqueſt they diſſolved the partnerſhip, becauſe the houſe at Paris (ſays Mr. Lothbiniere) *could not* have any right after the conqueſt in the effects and eſtates in Canada; *they at Paris transferred* (what therefore they could not transfer, having at that period, as he admits, no property in the eſtate, and only a ſhare) *the whole in Montreal to the Religious there, who* probably *were not* (vraiſemblablement, ſays Mr. Lothbiniere,) *attornies of thoſe at Paris; and this was done by the latter, upon paying a compenſation, being the difference of the account upon a balance.* This after all is oui dire, as he ſays *he has heard and believes:* and it ſtands againſt the evidence of Mr. Mazeres, if it were contradictory; but it appears manifeſtly, that the

the Religious at Montreal have only a coloured and oſtenſible title. There is alſo the evidence of a gentleman of undoubted veracity and knowledge, who having had tranſactions with Father Magulphi, the perſon acting in the colony for the community of St. Sulpice at Paris, with a view to ſome purchaſe, the real proprietors were forced to come forward, and the uncertainty of their title broke off the negotiation. The evidence of Charlevoix alſo may be added. *In* 1657, ſays Charlevoix, *the Abbé Quelus returned with the* deputies *of the ſeminary of St. Sulpice at Paris, to take poſſeſſion of the iſland of Montreal, and to found a ſeminary there.* By the French law it is clear, that no perſons aliens not being naturalized can hold lands; ſo that *by the right of conqueſt*, agreeably to Mr. Lothbiniere's own idea, *for want of owners domiciled at the time of the conqueſt*, theſe eſtates may be underſtood in point of law to be fallen to the crown in ſovereignty.

As it is of the higheſt conſequence to your Majeſty's government, to underſtand perfectly the nature of all the eccleſiaſtical foundations in Canada, I cannot diſmiſs the ſubject of the Seminarians of Sulpice without obſerving, that in the ſeveral dioceſes of France there are ſeminaries for the education of poor ſcholars, to ſupply the parochial clergy *: that theſe ſeminaries are under the guidance of the reſpective Dioceſan, who commits the adminiſtration of them to ſecular or regular communities; that where there are monaſteries which appear not to anſwer the purpoſes of their foundation, the biſhops in France have a power, by a formal proceeding, to ſuppreſs them, and to endow the ſeminaries with their revenues and eſtates. The communities, or congregations, as the canon law

* A French author of authority ſays, that cardinal Pole, in the ſixteenth century, archbiſhop of Canterbury, directed ſeminaries of this kind to be erected in England: as it appears by ſome of his conſtitutions or decrees made in 1556 for the reformation of the church.

calls

calls them, in France, are of ſecular or regular prieſts, formed of different houſes which have their particular heads or ſuperiors, but which congregations are under the government of their ſuperior-general: ſuch are, according to Denyſart, being the ſecular congregations, the prieſts of the Oratory, thoſe of the Chriſtian Doctrine, of the Miſſion, of the *ſeminary of St. Sulpice*, or pariſh prieſts of Paris: the Eudiſtes, and others.

There are alſo regular congregations. The difference between the regular and ſecular congregations is, that the ſeculars live in common, without vows, under the authority of the dioceſan biſhop. The others are religious profeſſed, with vows of ſtability in the ſame domicil, and living in common under the authority of their particular head or ſuperior, and under the rules of their founder as approved by the head of the church, and confirmed by the civil power, which gives to ſuch incorporated bodies a legal eſſence. Of courſe,

the archbiſhop of Paris muſt have the direction of the ſeminary of St. Sulpice, and all its dependencies in Canada.

It muſt be obſerved farther, that by the eccleſiaſtical law of France, no congregations can alienate or transfer their eſtates and effects; nor can ſuch ſocieties, from the nature of them, be diviſible, ſo as that one part of the ſame congregation can tranſfer to another. It is eaſy then to judge whether ſuch transfer has been really made, as Mr. Lothbiniere repreſents, and where the property of the eſtates of the Sulpicians in Canada is centered at this inſtant.

In regard to the title of the eſtates of the Jeſuits, there is annexed to this report a ſketch of a former one in deliberation, drawn up in a very full manner, by particular direction in the time of Mr. Grenville's adminiſtration, May 12th, 1765; but upon a change of adminiſtration ſoon after, and of the other law officers of your Majeſty, to whom it was referred jointly with

with the advocate-general, no report was made in form.

Upon the whole, it may be proper for an act of parliament to declare that all grants, transfers, hypothecations, conveyances of any kind, made by ſuch religious communities as were not domiciled in Canada at the time of the reſpective capitulations, to any perſon or perſons in the interval between the capitulation and the treaty of Paris, or ſince that time, are ipſo facto null and void.

Farther it may be enacted, that the payment of all tenths, dues, rents, and profits, of whatſoever kind, heretofore paid for the account or benefit of any religious order, of whatſoever denomination, or general, eccleſiaſtical perſon, prelate, or pontif or potentate, *not domiciled in the ſaid colony at the time of the capitulation*, ſhall henceforth ceaſe and determine; and that all perſons reſident in the ſaid province, whether eccleſiaſtical or lay, ſhall be expreſſedly prohibited

hibited from paying or remitting the ſame for ſuch purpoſes, under the penalty of treble value, and full coſts, upon conviction, to any perſon who ſhall inform: and that the attorney-general ſhall proſecute, at the expence of the crown, upon ſuch information, or ex officio, in the court of King's Bench in the ſaid province. But as it may be difficult to prove ſuch payment or remitting, it may be enacted, that any perſons who ſhall have received moneys for ſuch purpoſe, may lawfully keep and apply the ſame at their diſcretion, to any charitable, or public purpoſes, for the benefit of the province; and that all truſts, contrary to the letter or ſpirit of theſe acts, ſhall be null and void.

For the encouragement of induſtry, it may be enacted, that no days ſhall be kept holy, nor ſhall the people be prohibited by the eccleſiaſtical ſuperintendant or prieſts, from working for the ſupport of themſelves and families, except Sundays, Chriſtmas-day, and Good-Friday;

Friday; and that all other feaſts, holy-days, or faſts ſhall be aboliſhed, except it ſhall be otherwiſe ordered by the governor of the province, in the nature of his Majeſty's proclamation; and that if the ſaid ſuper-intendant, or any prieſt, ſhall prohibit as above, or ſhall enjoin feaſts, holy-days, or faſts, other than as above, he or they ſhall ſuffer impriſonment for ten days, and pay five pounds and full coſts of ſuit, to any perſon who ſhall ſue for the ſame in the court of King's Bench.

It may be proper that the twentieth article of the board of trade ſhould be confirmed; in as much as it correſponds with the *decency* preſcribed by the anſwer to the ſixth Article of the capitulation of Quebec: and all proceſſions of pomp and parade ſhould be prohibited, *as againſt the peace of the realm.*

It would be happy for the ſick if the hoſt were not to be carried to their houſes and beds, to diſturb them by a croud of followers, as is uſual: and this deſerves regulation

gulation as an article of police, as well as of religion and humanity to the ſick and expiring; beſides, that this practice, by a croud bringing back the hoſt, is an effectual means of ſpreading the ſmall-pox, and other peſtilential diſorders in the colony. The conſequences of a biſhop's marching through the ſtreets in proceſſion, want no obſervation.

For compoſing the minds and gratifying the eſtabliſhed Roman catholic clergy of the province, it ſeems proper that the tithes, in the manner as uſually taken, ſhould be confirmed to the ſecular clergy, in the manner hereafter to be ſet forth; and that all tithes paid (if any tithes are paid) to the religious houſes, which houſes ſhall be ſuppreſſed, ſhall be granted to the reſpective landholders of whom ſuch tithes are taken; which meaſure would greatly engage them to ſupport the new government and eſtabliſhment. If it ſhould be thought proper to reſerve the ſeminary of Montreal out of the general diſpoſition

poſition of the revenues of the religious houſes; it might be done with the following view, that the revenues of the ſaid ſeminary being veſted in your Majeſty, the tithes and eccleſiaſtical dues and eſtates, (not otherwiſe being applied by your Majeſty's pleaſure) belonging heretofore to the ſaid ſeminary, ſhall be applied to ſupport ſuch perſons in the ſaid ſeminary as your Majeſty ſhall from time to time think proper to give licence to be admitted therein, and for the maintenance of profeſſors in the ſeveral ſciences, to be appointed by your Majeſty; reſerving always to your Majeſty and your heirs, your royal prerogative to viſit the ſaid ſeminary of Montreal, by your commiſſioner, or commiſſioners, under your ſignet and ſign manual, and to give or repeal, from time to time, ſuch ſtatutes and regulations as your Majeſty in your great wiſdom may think neceſſary for the direction of the ſaid ſeminary: and to remove and diſpoſe of the head and members of the ſaid ſeminary at your Majeſty's pleaſure.

It may be proper to prohibit that any ſchools ſhall be ſet up, or that any perſon, either lay or eccleſiaſtical of the perſuaſion of the Romiſh church, ſhall preſume to teach publicly, or read lectures in any ſchool, without licence from the governor; and revocable at pleaſure.

It is ſtated that the patronage of only twelve pariſh churches and benefices in the province, out of an hundred and twenty-eight, or thereabouts, is in the poſſeſſion of ſeigneurs, and that the reſt were in the collation of the biſhop of Quebec. This fact is not quite clear, for in 1743 Charlevoix ſays, that the livings in all the iſland of Montreal and its dependencies, were in the gift of the ſeminaries of St. Sulpice. It might be proper to declare that the patronage of all the eccleſiaſtical benefices heretofore in the gift of any eccleſiaſtical perſons, or prelate, are by right of ſovereignty veſted in your Majeſty; and that your Majeſty hath a right to grant the ſaid patronage and power of preſenting to your Majeſty's

Majeſty's governor, chief juſtice, or any other ſubject, lay or eccleſiaſtical, as your Majeſty in your royal wiſdom ſhall ſee meet from time to time.

Before this ſubject of the eccleſiaſtical eſtabliſhment of the province is diſmiſſed, it may be proper to take ſome little notice of the regard which the religion of the dominant power has a right in common decorum, and in the eyes of all Europe to claim in the new ſyſtem.

The Engliſh Proteſtant ſettlers, while the largeſt ſeigniories are got into their hands, and more are getting daily, think it hard that they ſhould pay tithes to Popiſh clergy: ſome of the Popiſh ſeigneurs are as little delighted with it. It is however juſt, that the parochial clergy ſhould have their dues. The former, the Britiſh Proteſtant ſettlers, are unreaſonable to complain of paying tithes; becauſe it is indifferent in point of juſtice to whom they pay, as they make purchaſes

of

of eſtates with that civil burthen upon them, which may remain or not, as the grant of tithes is reſerved to your Majeſty's pleaſure by the capitulation. If tithes therefore were to be taken away from the clergy, yet they would belong either in natural equity to the ſeigneurs, who gave the glebe, endowed and built the churches, together with the pariſhioners, or to the crown, as to the ſeigneur paramount, the heirs of thoſe ſeigneurs and pariſhioners, who perſonally contributed, not being known. Upon the whole, when I ſpeak of tithes as due to the Popiſh clergy from Proteſtant landholders, I mean only prædial tithes, as ariſing from land, not perſonal tithes, from which I think they ought to be excepted.

The gens de maine morte, or religious orders cannot complain that any injuſtice is done to them perſonally, by ſuffering the eſtates of the ſaid eccleſiaſtics, as corporate bodies, to die away with them: as they *by vow can have no ſucceſſors of their bodies*, ſo your

your Majeſty is their right and lawful heir, who by your royal protection are their real father, and by the increaſe of their penſions, will be their moſt beneficial patron.

It appears to be policy to make the parochial clergy happier, if poſſible, than they uſed to be under the French ſyſtem: to take away nothing, but to give them more, as *individuals*, under an Engliſh one. No method appears more likely to anſwer all theſe purpoſes, and to create a dependence on your Majeſty's, government, than a plan which follows hereafter, and which has been propoſed with great juſtice, wiſdom, and ſagacity, in reſpect to the collecting of tithes as a part of the public receipt of the province.

It is a miſtake to ſuppoſe that tithes were recoverable in the eccleſiaſtical court in the province. Tithes are due of civil right in France, and ſo all their lawyers

hold. There are dîmes infeodées, viz. tithes impropriated and annexed to lay fiefs, according to Denyſart, and all the caſes quoted by him were determined in the grand Conſeil, or Parlement. By the laws of France, the manner and proportion of tithe depend entirely upon the uſage of the place. A ſtrict tenth of the fruits of the earth in kind is never taken. But it no where exceeds a twelfth part: and commonly (upon the authority of a great French lawyer, Monſieur Ferriere), a twentieth, or a twenty-fourth part is only taken in Old France: an inſtance of great moderation and prudence. In Canada a twenty-ſixth part of the fruits of the earth is only taken, after being threſhed and carried into the granary, by arrêt of the ſuperior council of New France, September 1667 *. This arrêt ſhews that tithes in Canada were determined in the civil judicature.

* Vide Charlevoix, l. viii. p. 341.

It

It is certain, that in the preſent ſtate of things the Popiſh clergy hold their tithes upon a very uncertain bottom. They do not attempt to demand them of the Proteſtant landholders: many of the Popiſh landholders refuſe to pay them. The Engliſh lawyers have been of opinion, that they are not recoverable by law; upon this ground, that the twenty-ſeventh article of the capitulation expreſſedly reſerved the whole of this ſubject to your Majeſty's pleaſure. As tithes and church rates were recoverable before the intendant of the province during the French government, it is therefore propoſed that it ſhall be enacted, that all pariſh rates for repairing the church and church-yards, ſhall be levied on the inhabitants, and recoverable by the churchwardens by an action in the civil courts; and that all prædial tithes ſhall be paid by the occupiers of lands, and be taken as heretofore, and be recoverable by action before your Majeſty's chief juſtice: but that the ſame ſhall be paid

to, and taken by the receiver-general of your Majeſty, who may have power to let the ſame for a term of three years to the beſt bidder; and that the amount ſhall be afterwards diſtributed in equal proportions, and ſhall be for the benefit (not of Proteſtant clergy only, which is the objection made to this regulation) but of the Romiſh clergy of the reſpective pariſhes as now ſettled, or who ſhall, with the conſent of the greateſt part of their pariſhioners, conform to the doctrines of the church of England, or to be applied in ſuch manner, and for ſuch uſes as your Majeſty, in your great wiſdom, ſhall judge from time to time to be expedient.

I do not conceive that there is any reaſon for referring * cauſes of tithes to the governor and council in the firſt inſtance, whether merely for the ſake of imitating the exchequer in England, or for any other

* Vide ſollicitor-general's Report.

reaſon:

reaſon: becauſe the chief juſtice and a Canadian jury will ſettle the matter of uſage in as good a way as any other civil right or property, and *laymen* as well as eccleſiaſtics are equally concerned. If it is thought that the governor and council may favour the clergy againſt the laity, to eaſe themſelves in governing the latter, it will certainly be at the hazard of diſobliging all the ſeigneurs and landholders. I do not therefore conceive either the juſtice or policy of altering the mode of ſuing for tithes, or rights of patronage, in any other way than as for all other property, without diſtinction of any order of men. As it would elevate the conſequence of the ſeigneurs, if it were propoſed to behead them when criminals, ſo it would raiſe the pride and importance of the Popiſh clergy that their cauſes for temporal property ſhould be privileged in the mode of purſuing them, beyond that of the firſt lay Canadian ſeigneur. I have

another objection to this reference, (as it is propoſed to be, not only of cauſes of tithes, but of preſentations) in the firſt inſtance to your Majeſty's governor and council; becauſe if the governor has patronage in right of your Majeſty, he then will ſit as judge in caſes of his own preſentation.

It is propoſed in the plan of the board of trade for the eſtabliſhment of eccleſiaſtical affairs in the province of Quebec, *to apply indiſcriminately the revenue of all the religious communities for Proteſtant purpoſes, and that the churches ſhould be alternately in uſe between the Proteſtant and Popiſh clergy.* The firſt regulations, if theſe revenues are veſted in the crown agreeably to the former propoſitions for the purpoſes of religion and learning, will be left in the execution to your Majeſty's royal pleaſure. The latter regulation, it is conceived, would be a ſource of great diſcontent and animoſity, and as fatal as

in

in the ſame caſe, in modern hiſtory, the alternate uſe of churches was at Thorne in Poland, and which occaſioned ſo much blood to be ſpilt. But if any churches were to be reſerved and appropriated alternately for the ſervice of the church of England, it ought to be the cathedral of Quebec, the churches at Montreal, and Three-Rivers; the monies which have been raiſed by contribution, and expended in the repairs of the cathedral, being reſtored at the expence of government to the original contributors. This appropriation would be agreeable to your Majeſty's mandate to the governor, to collate and admit Mr. Montmollin to the pariſh church of Quebec, which I underſtand has never been complied with. Two more mandates of the ſame ſort in the caſes of very proper French clergymen, one a native of Canada, the other of Old France, have not been complied with; the facts relative to which are fully ſtated in the printed Collection of the attorney-general Mazeres, p. 149.

Indeed if it could be practicable without diſorder, in ſome future time, whenever the number of Proteſtants ſhall be conſiderable in any pariſh, that an alternate uſe of churches ſhould be permitted by the governor, on petition of a certain number of Proteſtants, it would tend to take away by degrees that ſeparation and idea of abhorrence which is politically cultivated by the preachers of the Romiſh religion, between the Catholics and the Proteſtants.

It is, I fear, a miſtake to ſay that the Jeſuits have remained quiet in the province. The fact charged upon a Jeſuit, Father le Franc, by Louis Lothbinere a prieſt, of lately preaching publicly, and on the ninth of March laſt, in the church of the Jeſuits, in Lent, that *whoſoever, among the Roman catholics, have any connections with the Britiſh ſubjects, are dogs excommunicated by the church and damned for ever*, deſerves to be particularly enquired into

into by the King's law officers of the province; becauſe it is contrary to the peace of the colony and the realm. A like fact and doctrine is reported of Father Floquet, a very zealous Jeſuit, and famous preacher at Montreal. The truth of theſe facts is made too probable by the refuſal of burial of Proteſtants, which is not to be doubted.

By the canon eccleſiaſtical law, as well of the Romiſh as of the Proteſtant churches, every pariſhioner and inhabitant, of common right is intitled to a place of burial in the church of the pariſh; and in France he is ſo by the civil laws of the realm, unleſs the party (as a convict) lays under interdict or excommunication, by ſentence of ſome competent juriſdiction; and this as being in pænam, perſonally, as a penalty of notoriety and legal publicity. This law of the civil courts of France, and of the Gallican church, is directly in oppoſition to the doctrine of the fourth council of Lateran

teran, 1215, of Innocent the III. which denounces (in certain caſes of omiſſion of confeſſion, and of other eccleſiaſtical ceremonies) interdiction, excommunication, and deprivation of ſepulture *ipſo facto*, without any form of trial. The remarks made by Denyſart upon the reaſons of the diſpoſitions of this canon not being followed in France are perfectly juſt; viz. *that no ſuch general laws can be executed, till they are announced by the lawful judge; becauſe, to permit execution without ſentence, would be an inſtrument of the moſt powerful and unjuſt oppreſſion.* Collection de Deciſions, vol. iv. p. 511. *The allowing the right of ſepulture*, ſays the ſame celebrated lawyer, *was regarded by the heathens themſelves as the duty of all human kind: and that the moſt deteſtable crime which a man could commit was to refuſe burial to the dead.* The refuſal therefore of the clergy in the colony to permit the burials of the Proteſtant inhabitants, native born French or Engliſh ſet-

tlers,

tlers, can only have ariſen from the ſame deteſtable doctrines; and this general refuſal is a circumſtantial proof of the truth of ſuch facts as have been mentioned, and of ſome very undue uſe of eccleſiaſtical authority having been made in the province, againſt the peace and dignity of your Majeſty. For the refuſal can go on no other ground, than the keeping up the prejudices of the moſt bigotted Roman catholic ſubjects, that thoſe who approach near Proteſtant bodies, living or dead, are condemned to perdition: and that your Majeſty and all your kingdoms ſtill remain under the interdict and excommunication, ipſo facto, of the ſee of Rome, as denounced by pope Pius, againſt theſe realms and their ſovereign, your Majeſty's predeceſſor, Queen Elizabeth, of glorious memory. There can be no doubt of the truth of the fact of the refuſal of burial to Proteſtant ſubjects, upon the evidence of Mr. Mazeres, and of Monſ. Lothbiniere, who undertakes the defence of it, Art. XIV. in anſwer to him.

It

It is ſubmitted, if any thing ſhould be thought proper to be done now or hereafter concerning a Proteſtant eſtabliſhment, that Proteſtant churches ſhall be built and endowed, either out of thoſe revenues ariſing from the diſſolution of religious houſes, or by money to be granted by parliament for that purpoſe, or *duties to be laid on the purchaſe of lands by Britiſh ſettlers*; for that expreſs purpoſe, or by ſome other mode.

It is ſtated that four Proteſtant clergymen are already eſtabliſhed at Quebec.

Firſt. The chaplain to the garriſon at Quebec, ſalary 120 l.

Second. Chaplain to the garriſon at Montreal, ſalary, 120 l.

Third. Pariſh miniſter at Quebec, 100 l.

Fourth. Pariſh miniſter for the town of Three-Rivers, 100 l.

Fifth. Pariſh miniſter at Montreal, held at preſent with the chaplainſhip of the garriſon.

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The chaplains of the four regiments do not attend them; the conſequence of which is, that the common men become almoſt immediately converts to the Romiſh religion.

As non-reſidence of the clergy in all the Britiſh colonies has become a matter of very juſt and ſerious complaint, and ſeems at preſent to be without a remedy, it would be neceſſary to enforce reſidence within the diſtrict: and that no eccleſiaſtic, being beneficed, either Proteſtant or Roman catholic, ſhall go out of the province of Quebec, or *of any of your Majeſty's colonies in America*, without licence of the governor; and giving ſecurity to return without exceeding twelve calendar months, and on pain of forfeiture of his benefice. It may be proper that the ſalary of the miniſter of Quebec, as the capital of the province, be made 500 l. a year. That at Montreal 300 l. That at the Three-Rivers 200 l. The chaplains of the garriſon at Quebec and Montreal 150 l. each. And that no perſon,

perſon, after Mr. De Liſle, ſhall hold more than one eccleſiaſtical preferment under any denomination. And that the chaplains of the ſeveral regiments ſhall attend them, in failure whereof, that others ſhall be appointed in their room by the governor.

Laſtly, that if any Roman catholic, lay or eccleſiaſtical perſon, ſhall offer to take the oaths of abjuration in any chapel or Proteſtant church of the garriſon or province, no perſon ſhall refuſe or hinder him therein, nor refuſe to admit or put any perſon into poſſeſſion of any church or benefice, to which your Majeſty, or your repreſentative, ſhall by right of patronage preſent, under pain of incurring a præmunire.

I agree to the propoſition, that no ſtate has been overturned by toleration; becauſe in all ſtates which are *undivided*, the greater number tolerates the leſs. Hitherto, ſince the conqueſt, the Roman catho-

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lic religion in Canada, *divided* from Great Britain at ſuch a diſtance, only tolerates the Proteſtant; becauſe the poſſeſſors of the former ſyſtem are prodigiouſly ſuperior in number; which nothing can leſſen but the removing their ignorance, by the introduction of learning and commerce, and removing eccleſiaſtical foreign authority; by endeavouring to extirpate, not men, but opinions, by a modified toleration, and to lay a foundation for the church of Canada to reform itſelf by degrees: which is all that can be done, or ought to be attempted.

I cannot ſee any reaſon why the ſubject of theſe modifications of the exerciſe of the Romiſh religion, which involve great conſtitutional queſtions of the law of the realm, and of your Majeſty's ſupremacy, ſhould be referred * to any legiſlative body of the province, part of whom are propoſed to be Roman catholics, and not to

* Solicitor-general's Report.

a Brit-

a Britiſh parliament. I cannot conceive but that this mode of proceeding would be liable to the greateſt obſtructions, uncertainty, and diſſenſions. The ſettling the laws of property and the courts of juſtice is adviſed to be referred to your Majeſty's great council in parliament; I cannot therefore underſtand the diſtinction, nor the propriety of the meaſures of carrying elſewhere the queſtions in reſpect to religious perſons and their property, which is mixed with the laity and lay concerns.

Whenever the ſeveral acts of parliament ſhall paſs, a proclamation ſhould iſſue, penned with the greateſt care, agreeably to the tenor of thoſe acts, that the alterations and additions of the laws of this colony may be made known to all your Majeſty's ſubjects.

I am of opinion that the Jeſuits ſhould be ſent immediately out of the province; becauſe I do moſt truly concur in * opinion

* Solicitor-general's report.

that

that it is impoſſible, the facts charged being out of the queſtion, that they ſhould ever be *ſyſtematically friends* to Great Britain, and your Majeſty's ſucceſſion; nor are they any where agreeable to the ſecular Romiſh clergy, with whoſe rights in the greatly intereſting and public points of confeſſion and education they manifeſtly interfere.

Laſtly, The ſeveral acts of parliament relating to the ſaid province, which ſhall be made, and all ſtanding or future orders of the governor and council, and all other new regulations whatſoever, which are to have the force of laws, ought to be printed in the French and Engliſh language, and be put into a book in every pariſh church in the province, being firſt read in full congregation, and once in every year, by the miniſter thereof; and kept by him and the churchwardens, as a record of the pariſh, for the uſe of the pariſhioners; in order for the better avoid-

ing diſputes, and that no perſon may pretend ignorance of the law, and that the penalties thereof may not be kept ſecret, ſo as to intrap innocent and well meaning ſubjects, and bring their loyalty into queſtion, or otherwiſe to leave them without that certainty and confidence in the laws touching their perſons and properties, *which confidence is the only tie of civil government.*

I have now faithfully laid before your Majeſty, without the leaſt bias to any man, or ſyſtem of men, every circumſtance which has occurred to my mind, upon the whole ſubject, in the extent as referred by your Majeſty, by bringing all facts, propoſitions, and reaſonings together into one general view before your Majeſty: not without pointing out ſuch a probable plan as may be purſued in the whole, or by parts, from time to time; which plan may

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be conſiſtent with the conſtitutional forms and ſpirit of the reſt of your Majeſty's government, and the laws, uſages, and policy thereof. In what way the executive powers ſhall be exerted by your Majeſty upon this occaſion, ſeems to be the proper province of your Majeſty's judges of the common law of the land to adviſe. The operation of the treaty of Paris and capitulations by the principles of the civil law, and of nations, the nature of the eccleſiaſtical rules, and foundations, the canon and common laws of France, and the prerogative of that crown exerciſed in regard to all eccleſiaſtical perſons and their property, are parts of the general ſubject which it became me in my place in a particular manner to enlarge upon. The leading legiſlative principles, the actual ſtate of the colony, the courts of judicature, the local law of the province, and the revenue, and the ſeparate articles of the projects of the board of trade, have been minutely entered into. I ſenſibly feel, in a long courſe of

office, the weight of ſuch ample references concerning queſtions, in which law and policy are inſeparably blended; too extenſive for the leiſure and capacity of any one man, and too hazardous for the prudence of moſt men. My particular duty to your Majeſty has now, as always, overcome every private conſideration; and I had rather err in ſtrictly diſcharging my truſt, than not to have attempted to think right, or having thought wrong, not to acknowlege my errors and correct them. Too many diſcuſſions cannot be entered into upon ſuch a ſubject, with courage and ſincerity, for the juſtification of your Majeſty's ſervants, the ſafety of the colony, and the intereſts of the realm. If in the private line of life it is ſo hard to ſay what is the ſupreme good of any ſingle being, how much more difficult is it to aſcertain *(which your Majeſty's law ſervants are now called upon to do, in forming a code of laws)* the higheſt degree of political good

to mankind, in the aggregate of any civil aſſociation? To aid your Majeſty's ardent wiſhes for the utmoſt happineſs of your ſubjects, muſt be eſteemed the moſt honourable of labours; and although little is done by the wiſdom of men, and by refined reflections, in fixing the fate of kingdoms, ever liable to thoſe concuſſions in hiſtory which give their forms and force to various governments, yet I am convinced, from the feelings of my own mind, that the political and legal conſtitution which your Majeſty in your great wiſdom ſhall give to the colony of Canada, will be the probable foundation of a great empire in future times, when this iſland of Britain, by inteſtine diſſenſions, or the invaſion of foreign enemies, ſhall ceaſe to have its weight in the ſcale of Europe.

Moſt humbly ſubmitting the whole matter, in which your Majeſty's perſonal

glory is ſo greatly concerned, to your Majeſty's ſupreme wiſdom, aided by opinions of much higher authority than thoſe which are here offered,

I have the honour to remain,

with all reverence and duty,

your Majeſty's

moſt faithful and devot

ſubject and ſervant,

College of Advocates,
Doctors Commons, 1771.

JAMES MARRIOTT.

APPENDIX.

NUMBER I.

Letter to the Attorney and Solicitor-general, upon a ſecond reference† of the caſe of the Jeſuits in Canada.*

To the Attorney and Solicitor-General.

Doctors Commons, May 12th, 1765.

GENTLEMEN,

I Have the honour to tranſmit to you two references made to us by his Majeſty's command: and in order to ſave time, engaged as you are in ſo great a variety of buſineſs, I take the liberty of ſending you ſome few obſervations on the ſecond reference, it being expected that

* Mr. Norton, and Mr. De Grey.

† By the right honourable the earl of Halifax, his Majeſty's principal ſecretary of ſtate; a copy of an arrêt of the parliament of Paris having been obtained.

our report ſhould be very full on this ſubject; and which report will be circulated wherever the ſociety exiſts. I will make any day or place agreeable to me, to ſettle our report, which will beſt ſuit yourſelves, if you will fix it together, and favour me with notice a few days before.

In order to anſwer fully the purpoſe of the reference, I apprehend it is neceſſary to enter into a detail, and to keep the inſtitute of the ſociety conſtantly in view.

In anſwer to the queſtions.

What eſtate is veſted in the communities or ſocieties of Jeſuits, which they occupy in houſes or lands in Canada?

Whether they could, without powers from the father-general or ſuperior, before *the expiration of the eighteen months allowed for the ſale of eſtates under the treaty of Paris, and* now *can make a* good title *thereto?*

And whether the general or ſuperior, reſiding at Rome, and never having been in Canada, could have given, *and now can give,*

give, powers to make a legal title for the ſale of ſuch poſſeſſions?

I beg leave to obſerve, that, beſides the Jeſuits of the leſs Obſervance, who are to be found in every part of the world, concealed agents of the ſociety, laymen as well as prieſts, perſons who have been married as well as thoſe who have never married, and of all conditions and employments of life, (the whole order amounting to twenty thouſand men in the year 1710, and ſince increaſed in proportion to the enterpriſing genius of that ſociety in the courſe of half a century) the known communities of the Jeſuits in Canada are the *miſſions*.

The miſſions are, properly ſpeaking, draughts from the houſes of the profeſſed; (agreeably to the plan of this order, founded by a military man on military principles) they are engaged by their fourth vow to go to any part of the world where the Pope, or their general ſhall ſend them, *non petito viatico*. The miſſions are ſo called

called in their inſtitute, in diſtinction to the houſes of the profeſſed, and from the houſes of the noviciats and colleges. The miſſions, like the profeſſed, are all under a vow of poverty, and mendicants by inſtitution; and as the profeſſed hold eſtates in truſt for the noviciats and colleges, and the reſt of the ſociety, having nothing for themſelves, *otherwiſe than indirectly*, (for they never beg notwithſtanding their inſtitute) ſo the miſſions, who are *detachments from the profeſſed*, hold eſtates in the ſame manner. If the eſtates are donations, then they are held for ſuch uſes as the founders, by grant, gift, or deviſe, ſhall have directed, and *for ſuch further uſes as the father-general ſhall direct*; inaſmuch as all donations are conſtantly accepted by the order, and ratified by the general, with this ſpecial ſalvo, commonly known and *ſuppoſed to be acquieſced in* by the donors or their repreſentatives, *ita tamen ut in omnibus inſtituti ratio ſervetur*. And if the eſtates are acquired by purchaſe out of the

ſurplus

ſurplus of the funds *deſtined ad libitum* by the general for the ſupport of the colleges, or out of profits ariſing from commerce or perſonal induſtry, then the miſſions hold theſe eſtates for the benefit of the whole ſociety, whereſoever diſperſed over the whole world, but united under one ſovereign head domiciled at Rome, whoſe power over his whole order being unlimited, he is the ſole proprietor, and, as it were, the heart of the whole body, into which, and from which, all property has a conſtant flux and reflux by a circulation of the ſyſtem in all its parts. So that the eſtates of the ſociety muſt be conſidered in the poſſeſſion of one man, the general of the order; who is always by birth an Italian, an actual ſubject eccleſiaſtical and civil of the Roman pontif; upon whom he acknowledges a kind of feudal dependence, rather than an implicit obedience, (the father-general having ſometimes reſiſted, and being in ſome reſpects independent, even of papal authority) being in all other

relations

relations an abſolute ſovereign over his own vaſſals, who are independent of every civil government under which they reſide; to which they cannot be united in a *civil eſſence by the nature of their inſtitute, without ceaſing to be what their inſtitute makes them*, a diſtinct nation in the midſt of nations, and an empire in the midſt of empires. As all other regulars, according to the canon law, are *ſervants of their monaſtery*, ſo the *individuals* of the ſociety of Jeſuits according to their inſtitute are the ſervants, or rather *ſlaves* of their order; and according to the rule of law, by which *quidquid acquiritur ſervo acquiritur domino*, they have no property of their own.

It is remarkable, that the order (of which the province of France makes but a very ſmall part) has been only tolerated *proviſionally* in that kingdom, and upon *probation* of good behaviour, without ever having had any legal complete eſtabliſhment, as a part of the eccleſiaſtical and civil con-

conſtitution of the realm. The general of the order has conſtantly refuſed the conditions of the original admiſſion made by the acts of the aſſembly at Poiſſy of the Gallican church, and has alſo refuſed the conditions of the re-admiſſion of the ſociety on the ſame terms after their expulſion, (which re-admiſſion was granted by the royal edict, in virtue of a treaty between the crown of France and the papal ſee) *becauſe the terms of re-admiſſion were radically ſubverſive of the whole order*. To the original acts of admiſſion all ſubſequent edicts in their favour have had a retroſpect. So that the arret of expulſion remained always liable to execution; and the members of the order were merely as inmates, occupants of houſes and lands in France, and in the extent of the dominions of that crown, ſubject to *reſumption*.

From all theſe premiſſes, it ſeems concluſive that the titles of the ſociety paſſed, together with the dominions ceded to Great Britain,

Britain, (in which dominions thoſe poſſeſſions were ſituated) attended with no better qualifications than thoſe titles had by the laws and conſtitution of the realm of France, previous to the conqueſt and ceſſion of thoſe countries. But it ſeems further to be clear, that thoſe titles are now in a *worſe condition* ſince the conqueſt and ceſſion: for till that period they were only in abeyance, and ſuſpended upon a principle of probationary toleration; but by virtue of the natural law of arms and conqueſt of countries, confirmed by acts of the law of nations, by ſolemn ceſſion and guaranty, the poſſeſſions of the ſociety loſt of courſe all civil protection by the fate of war; but much more ſo by the only power, whoſe authority and intervention could have preſerved the property of theſe poſſeſſions to their ſuppoſed owners, having withdrawn its tolerance and protection, and deſerted them, as a *derelict* at the mercy and entirely free diſpoſition of the crown of Great Britain, by making

making no proviſion in the articles of ceſſion to ſerve the pretended rights of the community of Jeſuits; *nor indeed of any other eccleſiaſtical community*, which latter might have been under a more favourable view, having a civil being, and each houſe poſſeſſing a ſeparate property, diſtinct from others of the ſame order; whereas the order of Jeſuits, contrary to all other regulars, is *one indiviſible* order, aggregate indeed by its own inſtitute, but not incorporated by the laws of France; and the father-general never having been an inhabitant of Canada, nor a ſubject to the King of France, he could not *retire* and avail himſelf of the fourth article of the definitive treaty, nor ſell his eſtates, nor withdraw his effects within the time limited. In a few words, the ſociety of Jeſuits had not and cannot have any eſtate in Canada, legally and completely veſted in them *at any time*, and therefore could not, and cannot transfer the ſame before nor after the term of eighteen months, ſo as to make a good title

to

to purchaſers, either with or without the powers or *ratification* of the father-general; who as he could not *retire*, ſo he cannot retain any poſſeſſions in Canada, ſince the time limited for the ſales of eſtates there agreeably to the terms of the treaty; becauſe he is as incapable of becoming a Britiſh ſubject, as he was of being a French ſubject: nor can the individuals of the communities of the Jeſuits in Canada, take or transfer what the father-general cannot take or transfer; nor can they, having but one common ſtock with all other communities of their order, in every part of the globe, hold immoveable poſſeſſions, to be applied for the joint benefit of thoſe communities which are reſident in foreign ſtates; and which may become the enemies of his Majeſty and his government.

In anſwer to the queſtion, *Whether the perſons in poſſeſſion hold the ſame as truſtees for the general, or for the whole ſociety*

ſociety of Jeſuits, and in that caſe, whether ſuch truſt is not void in law? what forfeitures is incurred thereby? and to whom?

I beg leave to obſerve, that whoever the perſons are, who occupy the poſſeſſions in queſtion, they muſt be underſtood to hold the ſame as truſtees for the head and members of the one *indiviſible* ſociety, and political body of Jeſuits, of eccleſiaſtical and temporal union, forming, according to their inſtitute, *one church and monarchical government*, with territorial juriſdiction independent of all civil authorities under which the members of the ſociety are occaſionally diſperſed, and without *ſtability* of *domicil*; that ſuch truſts are therefore, from the very nature of this inſtitution, inadmiſſible by the law of nations and of all civil governments; they are void both in law and in fact, becauſe there is no legal corporate body civilly eſtabliſhed to take the *uſe*; but an alien ſovereign, and aliens

his ſubjects, who were and are utterly incapable, by the very nature of their inſtitute, of any civil exiſtence. The poſſeſſions, therefore, of the ſociety of Jeſuits in Canada, in every view of the caſe, are lapſed to his Majeſty by right of conqueſt, and acquired ſovereignty; by dereliction of the ſupreme power itſelf of whoſe *good pleaſure* theſe poſſeſſions were lately held, no proviſion having been made for them by it in the act of ceſſion; by the want of an original complete title in a body incapable of legal taking, holding, and tranſferring; by the nature of defective truſts founded upon ſuch defective titles; and by the non-compliance of the order, with the *proviſional* terms of their re-admiſſion, as probationary occupants, only pro tempore, into the dominions of France, domiciled in the perſon of their father-general at Rome, ſubject to the execution and effect of the arret which was paſſed by the original tribunals for their expulſion in 1594, to which they are ſtill liable, for never having

ing obſerved, but openly rejected, the conditions of their firſt admiſſion, which are the conditions of the ſecond, and farther, are liable, ipſo facto, *whenever they ſhould be hurtful and dangerous to the realm.*

In anſwer to the laſt queſtion.

What will be the proper methods to be purſued to diſcover ſuch truſts?

I conceive, with ſubmiſſion, that it would be an effectual method to diſcover ſuch truſts, as well as a great benefit for the civil and eccleſiaſtical eſtabliſhment of the ceded colonies; if his Majeſty ſhould be pleaſed to order a general ſurvey of all eſtates in them to be made, and to eſtabliſh an office of regiſter and record, and for the authentic copying and enrollment of all title deeds, grants, and aſſignments of lands and houſes held in the provinces of Canada and Louiſiana; and to appoint commiſſioners to make ſuch a ſurvey, to call for and examine perſons and writings,

and to tranſmit the records from year to year into the regiſtry of the high court of chancery of Great Britain, and to make a particular report to his Majeſty of the ſame, ſo far as relates to lands, or houſes, poſſeſſed, now or late, by any religious communities, or perſons, or applied by any perſons for their benefit, and to diſcover all concealed truſts for any purpoſes prejudicial to his Majeſty's rights, and the intereſts of *his realm*.

All which conſiderations, gentlemen, I have the honour to ſubmit to your reflections before we draw up our report: as the inſtitute of the ſociety is ſo very extraordinary, and our deciſion upon theſe important points depends entirely on its nature, I have annexed extracts which are taken from indubitable authorities. You muſt be very ſenſible, that an air of anſwering upon ſo complicated a buſineſs in three lines, will not ſerve the purpoſe of the king's miniſters, who deſire to be perfectly

fectly informed: and I ſhall not regret my particular trouble on this, or any other occaſion, if I have the ſatisfaction of your approbation in diminiſhing, in any degree, your ſhare of our joint labours, which are of much conſequence, in this caſe particularly, for his Majeſty's ſervice.

I am,

Gentlemen,

with great reſpect,

your moſt obedient

humble ſervant,

JAMES MARRIOTT.

NUMBER II.

Proofs and Extracts relating to the conſtitution of the Society of Jeſuits, annexed to the Letter to the Attorney and Solicitor-General.

CONcerning the Jeſuits of the leſs Obſervance, ſee the account taken by Eſtienne Paſquier from a Jeſuit; Recherches de Paſquier *. The bull of Sixtus V. 29th September 1587, gave the ſociety a power of ſetting up congregations in all their houſes, and in all places, *locis ſub gubernio ſocietatis exiſtentibus*, and to connect and unite theſe congregations with the congregation at Rome, *et primariæ Romanæ aggregandi.* So that theſe immenſe *congregations of lay brothers* form in

* Tom. II. l. iii. c. 44. p. 336. in fin tom. II. l. ii. lettre 11. p. 683.

every

every kingdom but one body, having the ſame ſpirit, intereſts, views and government, with the congregation at Rome. Vide Inſtitutum ſocietatis Jeſu, auctoritate congregationis generalis XVIII. meliorem in ordinem digeſtum, auctum et recuſum Pragæ. Typis univerſitatis Carolo-Ferdinandæ in Collegio ſocietatis Jeſu ad S. Clementium, 1757.

Father Jouvency ſays *, that in 1710, the ſociety had ſix hundred and twelve colleges, three hundred and forty houſes of reſidence, fifty-nine noviciats, two hundred miſſions, twenty-four houſes of profeſſed: the whole divided into thirty-ſeven provinces. The extent of theſe thirty-ſeven provinces, or territories of the ſociety, may be judged of from the conſideration that all France forms but five; which are called the provinces of France, Champagne, Guienne,

* Hiſtoire de la Societé, p. 967.

Thoulouſe, and Lyons. The miſſions are attached to ſome one of theſe provinces, or make themſelves ſeparate miſſions. According to father Jouvency, the number of the Jeſuits of the four claſſes was in the year 1710, on their own liſt, nineteen thouſand, nine hundred and ninety-eight. It is eaſy to judge from the enterpriſing ſpirit of the ſociety, how much that number muſt have increaſed in fifty-five years ſince. The four claſſes are as follow: firſt, the profeſſed, called by their conſtitution ſocietas profeſſa; ſecond, the coadjutors; third, the ſcholars, ſtudents, and approved ſcholaſtics; fourth, all thoſe who, without being of the three former claſſes, have taken a reſolution to live and die in the ſociety, and are in *probation* till it ſhall be decided into which of the three other claſſes they ſhall be admitted *.

* Inſtit. Soc. Jeſ. tom. i. p. 341. conſtit. part. v. c. 1. in declar. v. ibid. p. 402. Exam. gen. c. i. ſect. 8, et ſeq.

The

The houſes of reſidence, which are three hundred and forty, are the houſes of the miſſions out of Europe.

The miſſions are under a vow of poverty: it is the general rule of the inſtitute of the whole ſociety, hæc minima congregatio, ſic paupertatem accipiendo, ut nec velit, nec poſſit reditus ullos, ad ſuam ſuſtentationem, nec ad quidvis aliud habere *.

In the firſt bull obtained by them from Pius V. 1571, the terms are, declaratur ſocietas ex inſtituti ratione mendicans, aliiſque mendicantium ordinibus commemoratur et privilegiis æquatur; and in the diſpoſing and granting part the Pope ſays, quia ipſa *ſocietas mendicans* exiſtit, quippe quæ ex ejus inſtituto et conſtitutionibus apoſtolica autoritate confirmatis *bona ſtabilia poſſidere* nequit, ſed in certis eleemo-

* Exam. gen. cap. i. ſect. 1.

ſynis

ſynis fideliumque largitatibus et ſubventionibus vivit.

That the houſes of reſidence of the miſſions are *not independent of the general body* appears by the very form of the letters of authorization, which the provincial gives for the place of ſuperior-general of the miſſions of any particular province; and theſe powers are extended by ſpecial powers, or narrowed at the pleaſure of the father-general. The powers given are in *perſonas et loca* quæ in illis partibus *ad ſocietatem* pertinent: therefore thoſe perſons and places form no eſtabliſhments ſeparate and independent from the common maſs of the ſociety; but the authority is reſerved as to all contracts; non tamen alienationum, obligationum, ſeu gravaminum quæ collegium vel *ſocietas* ſubire debeat; in which caſe a ſpecial authority is made requiſite: ſo that the whole property of the houſes of the miſſions is clearly in the father-general.

Vide

Vide Memoire à conſulter, publiſhed *on the part* of the Father Jeſuits in caſe of Father de la Valette, p. 23.

The bulls of Gregory XIII. 1576, 1582, veſt all property in the father-general. It recites, bona ſtabilia et immobilia ſeu *quaſi ſtabilia* (in the language of our law, chattels real) nec non et pretioſa mobilia cujuſcunque qualitatis et facultatis, domorum tum profeſſarum, tum probationis, collegiorum, et aliorum locorum ubilibet conſiſtentium, informatione extra judicialiter ac ſummariè, et ſimpliciter acceptâ vel etiam *eâ omnino omiſſâ*; reſerving to himſelf to judge of the utility of the alienations or aſſignments, ſimpliciter, abſque figurâ judicii; nec ad venditionum communicationem, etaliarum hujuſmodi alienationum, utilitatis ſeu neceſſitatis, aut in equivalentia vel meliora boni pretii converſionis vel aliam demonſtrationem teneri.

The

The unlimited extent of the general's power further appears *, generalis, cum primum electus est, potest plenam exercere jurisdictionem in omnes sub ejus obedientiâ degentes *ubicumque commorantur*, etiam exemptos, etiam quascunque facultates habentes.

The general has granted to him by it, in *universos* ejusdem societatis socios et personas sub ejus obedientiâ degentes *ubilibet* commorantes. The provincials are as lieutenant-generals of the father-generaliſſimo. A generale præpositio, ut à capite, universa facultas provincialium egreditur, ac per eos ad locales, per hos autem ad singulares personas descendat. The missions are subject as well as the rest of the communities. Ab eodem capite, vel saltem eo suam facultatem communicante et rem approbante, *missiones* procedunt. Vide Instit. soc.

* Compendium privilegiorum et gratiarum Societ. Jesu, vel Instit. Soc. Jes. tom. i. p. 305. Verbo Generalis, sec. 1.

Jesu,

Jeſu, p. 424. Conſtit. part. 8. cap. 1. § 6. Idem generalis in miſſionibus omnem habet poteſtatem, par. 9. Bull of Gregory XIV. 1591, ibid § 2. It appears that the members of the ſociety are merely agents of the general, and though furniſhed *oſtenſibly* with his powers, quam vis aliis inferioribus præpoſitis, vel viſitatoribus, vel commiſſariis ſuam facultatem communicet, generalis poterit approbare vel reſcindere quod illi fecerint: how unlimited is the ſubmiſſion, in a ſyſtem ſubverſive of all good faith! ſemper ei obedientiam et reverentiam ut *qui vices Chriſti* gerit, præſtare oportebit: how ſhocking the impiety of an order thus conſtituted!

Gregory XIV. confirmed in his bull the preſent ſovereignty of the father-general; the terms are, univerſam gubernandi rationem Ignatius fundator *monarchicam* et in definitionibus unius ſuperioris *arbitrio* contentam eſſe decrevit. Præter cætera quamplurima, illud ſequitur commodi

ut

ut univerſus ordo ad monarchicam gubernationem compoſitus maxime ſervetur unitus, ipſiuſque membra per univerſum orbem diſperſa, per omnimodam hanc ſubordinationem ſuo capiti colligata promptius ac facilius ad varias functiones juxta eorum peculiarem vocationem et ſpeciale votum dirigi ac moveri poſſint. And the bull anathematiſes all who ſhall oppoſe their privileges, whether kings, ſtates, or prelates, upon any account or pretence whatever, and that the order ſhall be immutable even by the holy ſee itſelf, and *independent*; and what is more extraordinary, that if any pope ſhall decree hereafter to the contrary, the general ſhall annul the decrees, and reinſtate the ſociety of his own ſole authority. Toties in priſtinum et eum in quo antea quomodo libet erant ſtatum reſtituta, repoſita, et plenariè reintegrata, per præpoſitum generalem fore et eſſe, ſuoſque effectus ſortiri et obtinere.

The

The Jeſuits of Spain and Portugal, deſirous of a reform from this unlimited ſlavery to which they were ſubjected in 1593, petitioned pope Clement in theſe words:

Licet generalis habeat ſuos conſiliarios tamen non tenetur ſtare ipſorum conſilio ſed eſt dominus dominantium et facit quod vult nullis legibus adſtrictus: unde mortificat et vivificat: deprimit et exaltat quem vult, ac ſi eſſet Deus, qui liber eſt ab omni perturbatione et non poſſet errare.

The ſubordination and conſtant correſpondence of all the members of the ſociety with the father-general appears to be ſuch; that the whole ſociety are as it were always before him *.

The members of the ſociety devote themſelves, the movements of their minds and

* Inſtit. Soc. Jeſu, V. ii. p. 125, 126, Regulæ Soc. Art. de formâ ſcribendi.

bodies

bodies to the diſpoſiton of the father-general *, to be as dead carcaſſes without volition or life of their own, and as a ſtaff in a man's hand to be directed at his will †. They are to diſcover every thing they know or think to the father-general, relating to the ſociety, and to themſelves ‡. The revenues are to be laid before him ‖.

Whatever is accepted by the provincial and ſub-governors of the order, is always accepted under a reſervation for the ratification of the father-general. Vide Decree of the Congregation 1558. Bull of Pius V. 1568. Bull of Gregory XIII. 1576. Decree of 1581, in the formulary of the act annexed to it. Vide Acceptation of P. Viole of

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* Epiſt. præpoſ. general. p. 24.

† Conſt. p. 6. c. 2. § 1. Inſt. Soc. Jeſu, vol. 1. p. 407, ib. p. 408. Examen. Gen. cap. iii. § 12 Ibid. p. 344, 345. Declar. ib. p. 345. Exam. Gener. cap. iv. § 8. ibid. p. 347. ibid. c. iv. § 36, 38, 40. ibid. p. 351. ibid. c. iv. § 35. ibid. 350.

‡ Conſtit. p. 9. c. iii. § 19. ibid. p. 438.

‖ Conſtit. p. 9. c. vi. § 3. ibid. 442.

the

the college of Tournon, and procurator of the general, October 28th 1560. Vide Act of Acceptation of the Hotel d'Anville by Claude Matthieu, 12th January 1580, *provincial of the ſociety of France*, which runs, *tant en ſon nom que de tout le dit ordre et qui a promis de faire ratifier la dite acceptation au R. P. general de la ſocieté dans ſix mois prochain venant* *.

Vide Contract in 1622, between the mayor and echevins of the city of Angoulême, for the college of that city, and father Cotton, provincial of Guienne, who paſſed it, *ſous l'aveu et autorité de tres reverendiſſime P. Mutio Vitteleſchi general de leur congregation reſident à Rome, duquel il ſe fait fort, et a promis de fournir lettres d'acceptation et ratification.* Vide Recueil des pieces imprimées par le Mandement du Recteur en 1626, p. 7.

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* Hiſtoire de la Ville de Paris, par Felibien, tom. iii. p. 732.

Vide the ſame Reſervation to the father-general, in the Contract of P. Boette, made in 1623, for the college of Sens, with the mayor and echevins of that city, ibid. p. 75. The powers of the ſuperiors to P. Boette are, *ſub bene placito patris generalis, cujus ſit rem totam confirmare, poteſtatem facientis obligandi ſocietatem.*

Vide ibid. p. 184. Arret of the Parliament of Aix in Provence. Vide in the ſame terms, *ſub bene placito, &c,* the acceptation of the ſeminary of Straſbourgh in 1683.

In 1591, the donation made by De la Grange, who turned Jeſuit, was made to the company in the hands of the father Claude Aquaviva, general *. This donation was diſputed by the donor's family.

In 1730 the ſociety accepted of the foundation of a college made by a canon of Au-

* Arret dans le Recueil de plaidoyers notables, Paris, 1645, p. 106, &c.

tun

tun *provisionally*. On their supplication to the general, his rescript authorised them to accept it, but with a salvo respecting the disposal of the revenues of the foundation; *ita tamen ut in omnibus instituti nostri ratio servetur* *.

In the deed of the 1st Feb. 1745, by which father Diousidon, rector of the college of Bourdeaux, accepted the donation of ten thousand livres made to the professed house in that city, and approved by the general, it ends thus *le tout sous le bon plaisir de notre R. P. general, et selon l'esprit de nos constitutions.*

In the article 1609, proposed by the father Nevelet, rector of the college of Rheims, for uniting that college with the university, and in the decree of the 18th Oct. the very first clause is, *salvis instituti sui legibus et privilegiis quibus a sede apostolicâ donati sunt.*

* Oeuvres de M. Cochin, f. 4. Memoire pour les Jesuites.

In the cauſe of De la Malte, before the grand council, 1750, the ratification of the father-general was produced.

In the caſe of a contract made by two Jeſuits with the univerſity of Caen, in 1609, the ſociety inſiſting that the father-general had not given his conſent, they obtained the contract to be declared null; and they produced the letters patent, whereby the contract was ſo declared in a cauſe they had with the univerſity of Caen in 1720.

The univerſity of Paris made good uſe of this very ſame precedent againſt the ſociety, by ſhowing in a ſuit with the univerſity of Rheims in 1724, that the decree of 1609, and the tranſaction of 1617, which they pretended had united the ſociety with the univerſity of Rheims, were not ratified by the father-general, and therefore were null.

The

The union of all the houſes of the miſſions in general, and of the miſſions and houſes of New France or *Canada* in particular with the body of the ſociety, appears from the contract of father Biart, ſuperiors of New France or Canada, and father Ennemond Maſſie, in 1611, in which they ſtipulated on one part, *tant pour eux, que pour le province de France, et la dite compagnie de Jeſus* (the contract related to the cargo of a ſhip bound to Canada), and on the other part, viz. of the merchants contractors, the terms were *les aſſociès y conſentent que les dites Jeſuites, tant en leur nom qu'en la qualité ſuſdite jouiſſent et ayent à leur profit la totale moitiè de toutes et chacunes des merchandiſes, profits, et autres choſes, circonſtances, et dependances* So that the province of France, *the province of Canada, and the whole company* are indiviſible in their intereſts and property. The univerſity of Paris produced an authenticated copy of this contract in a law ſuit with the

Jeſuits in 1644 *. It ſhows that the houſe of the miſſions depends upon the province, the province upon the ſociety, and that all the miſſionaries its members are but agents of the company, which is united, as we have already ſhown, under one principal director of unlimited authority.

Theſe ideas of the ſociety, and of the titles to its poſſeſſions, are confirmed by the pieces written by Jeſuits, and publiſhed by the authority of their order in their famous diſpute with all the reſt of the regulars on the occaſion of the edict of the emperor Ferdinand II. in 1629, for reſtoring the eſtates of the empire which the proteſtants had taken away. The champions of the Jeſuits inſiſted, that no other orders could take but themſelves, becauſe the fraternities were *diſtinct*, which once held thoſe endowments, and were now extinguiſhed;

* Apologie de l' univerſité. Imprimée, 1643.

that they, the Jeſuits, were, on the contrary, one indiviſible order: that the generals and viſitors of thoſe fraternities which were local, had only a power as to the regular diſcipline of each ſeparate monaſtery; but that theſe viſitors were not (as in the order of them the Jeſuits) like their general, able to change perſons and properties, ad libitum. Vide, the work of father Layman, printed at Dilingen in Suabiâ, cum facultate ſuperiorum, intitled, Juſta defenſio Sanctiſſimi Pontificis, Auguſtiſſimi Cæſaris, S. C. R. Cardinalium, Epiſcoporum, Principum, et aliorum dectum Minimæ Societatis Jeſu, in cauſâ Monaſteriorum extinctorum et bonorum Eccleſiaſticorum vacantium. Father Jean Cruſius, who wrote at the ſame time a book, entitled, *Aſtri inextincti Eclipſis ſeu deliquium*, uſes theſe words which deſerve attention, and affect the caſe of *a conquered country*, Generalis ipſe, tanquam caput unius veri corporis politici, *iuriſdictionem*

habet *quaſi territorialem*; nam ipſius juriſdictio non perſonis ſolum, ſed etiam terris, rebus, bonis collegiorum terminatur: *competit bonorum collegiorum ab hoſte occupatorum*, vel etiam perſonalis collegiorum illorum *tempore invaſionis* repetitio; quæ in hujuſmodi caſu negatur aliis aliorum ordinum præſidibus; cum nec verum illorum Religioſi corpus conſtituunt politicum, ſed tantum familiæ aliquod plane διεφθαρτον. And farther he ſays, Societas, late accepta, eſt Domina bonorum & rerum ſuorum collegiorum, atque poſſidet cum illis bona corporata: quia ſcholares indifferenter & indiſcriminatim ſe habent ad omnia collegia ſocietatis; nec enim vovent hujus vel illius *loci ſtabilitatem*, ideoque *ad nutum* admodum R. P. Generalis ex uno in aliud transferuntur collegium. Secus res habet in ordine Sancti Benedicti, quia Profeſſi illius voto ſe obligant ad ſtabilitatem clauſtri.

Father Layman, in his book, called, Cenſura Aſtrologiæ Eccleſiaſticæ, et Aſtri in-

ex-

extincti, makes his own order to conſtitute of itſelf a *church.* * Cum manifeſtum ſit in ſocietate noſtra membra ejus omnia, ſub uno generali capite conſtituta & gubernata, unius Eccleſiæ corpus conſtituere.

From this view of the nature of *the inſtitute of the ſociety*, it clearly appears a priori, that it was *impoſſible* that the ſociety could gain a civil exiſtence, as a corporate body of eccleſiaſtics, in France; and it was far from the inclinations of the ſociety to be conſidered as ſubjects of any juriſdiction but their own. For this reaſon in the famous attempt which they made to be incorporated with the univerſity of Paris in 1564, and an interrogatory being put to them, *what they were in France? ſeculars, regulars, or monks?* their anſwer was, repeatedly to the queſtion, *nos ſumus in Gallia tales quales denominabit nos curia.*

* Cenſur. 8. p. 73.

It was to preſerve this independency of the order from all civil ſtates whatſoever, under which its members reſide, that the generals have frequently oppoſed, and effectually reſiſted the Popes themſelves, by having made themſelves neceſſary to the papal ſee.

Thus all the attempts to leſſen the power of the father-general, and to change the conſtitution of the order have never ſucceeded; Paul IV. Pius V. Sixtus V. Clement VIII. attempted it in vain. And when the parliament of Paris conſented to re-eſtabliſh the Jeſuits under certain reſervations, as before they had been admitted proviſionally in the aſſembly at Poiſſy, the re-admiſſion was in conſequence of the ſolicitations of Henry IV, and in conſequence of his treaty with the Pope; the Pope acquainted the King, and the King the parliament, in reſpect to the articles *que le general des Jeſuites ne s'en contentoit pas & ne les vouloit approuver, diſant, qu'ils*

etoient contre leurs ſtatuts, dont le dit general ecrivit au roi lettres qui pouvoient etre preſentées, et ne ſont encore les articles approuvès par lui. The King added, that it was a great point gained of the Pope, to admit the order in no other way. The parliament entered it upon their regiſters, that the Pope had deſired the King to eſtabliſh the Jeſuits, *comme ils etoient auparavant l'arrêt de la cour de* 1594, and re-eſtabliſhed them accordingly.

It may not be improper to inſert the ſpecial clauſes of the act of Poiſſy; which if acquieſced in, the Jeſuits muſt have quitted France. The firſt conſideration was, that they ſhould not be received as a religious ſociety. Second, that they ſhould take another name. Third, that they ſhould ſubmit to the juriſdiction, ſuperintendance, and correction of the epiſcopal diocefan. Fourth, that the company ſhould not attempt any thing to the prejudice of the biſhops, chapters, rectors, univerſities, nor

of

of the other orders: Fifth, that they ſhould conform themſelves to the ancient laws, renouncing expreſſedly and *previouſly* all the privileges contained in their bulls, inconſiſtent with the foregoing articles. *Autrement à faute de faire ou qu'à l'avenir ils en obtiennent d'autres, les preſentes demeureront nulles et de nul effet et vertu.* And the act concludes, with a ſalvo, *ſauf le droit de la dite aſſemblée et d'autrui en toutes choſes:* and when the act came to be regiſtered by the parliament, the conditions expreſſed were confirmed, and the concluſions upon the articles were, that the Jeſuits were received *quant à preſent*, &c. *à la charge des les rejetter ſi et quand çi aprés ils ſeroient decouverts etre nuiſibles ou faire prejudice au bien et etat du royaume.*

The Jeſuits allowed all theſe conditions and proviſions of their original admiſſion to exiſt, according to the act of the aſſembly of Poiſſy (none of which the ſociety either

either have fulfilled, or could possibly fulfil from the nature of their institution) among the pieces which they produced before the French king in 1715, in order to obtain the declaration of the 16th of July, the words are, *Qu'ils conviennent de bonne foi, que par l'acte de Poissy, et par l'acte de la cour qui en ordonne l'enregistrement, ils ne furent reçus comme religieux.* Vide Inventaire imprimé, signé De Sacy, avocat. P. Hazon, Jesuite, procureur-general de la province de France, pag. 6.

The distinction they have endeavoured to set up, between the colleges and the order, is neither supported by fact, nor by the institute of the society. For it appears from all the foregoing proofs of their institute, that there is one chain of dependence; that the colleges are not distinct as communities from the body; that the professed Religious hold in trust for the colleges: and, therefore, the conclusion is, that if, according to their own confession, the

the Religious of the order of Jeſuits are not received as perſons capable of a civil exiſtence, they are incapable of the truſts, and then the colleges are incapable of the uſes. Thus every thing, built upon the foundation of this anomalous ſociety, falls to the ground together. And it is no wonder, that an inſtitution, which ſeems contrived, with a ſubtlety more than human, to ſubvert the laws of every country eccleſiaſtical and civil, ſhould find in the laws of every country an obſtacle to its eſtabliſhment.

NUM-

NUMBER III.

Concerning the ancient Ordinances and Laws of the Police.

IN addition to the act proposed, under the head of the Law of the Province, it may be right to consider the following ordinances made by the governor and council.

An order concerning the licensing of public victualling houses, February 23, 1768.

An order for preventing accidents by fire, February 23, 1768.

An ordinance to amend an ordinance of the province, relating to the assize of bread, April 5, 1768.

An ordinance repealing a clause in a former ordinance of this province, dated May 5, 1765, concerning the currency of this province, April 5, 1768.

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An ordinance to amend and enforce a former ordinance for preventing accidents by fire, November 3, 1768.

An ordinance concerning bakers of bread in the towns of Quebec and Montreal, May 30, 1769.

An ordinance to reſtrain houſekeepers of victualing houſes from ſelling liquor by retail upon credit, beyond the ſum of half a Spaniſh dollar, May 30, 1769.

As there are ſome ordinances referred to in the above, which are taken from the collection of Mr. attorney-general Mazeres, which may be proper to be confirmed, ſo far as they are not repealed in any part by the ſubſequent ordinances, it would, in my opinion, be very right, that copies of all the ordinances iſſued by the governor and council ſhould be laid before us, to ſettle in the whole what ordinances may be proper to be confirmed.

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I am alſo of opinion, that the following arrets, edicts, &c. ſhould be conſidered whether they may be proper to be adopted.

Arrêt ſervant d'ordonnance du conſeil ſouverain du 16th Juillet 1768. concerning hunting and paſſing upon lands which are ſown, and breaking enclosures.

Arrêt du conſeil d'etat du Roi, 4 Juin 1686. concerning the buildings of mills and tolls, and rights called the Droit de Banalité.

It may be proper to make perpetual the Arrêt du conſeil d'etat du Roi de 6 Juillet 1711, concerning the grants of lands; ſuch grants are therein declared to revert to the crown unleſs the grantees ſhall actually procure the ſaid lands to be reſided upon, occupied, *mis en valeur*, or put in uſe within a year.

Declaration du Roi, 4 January 1717, 4 January 1724. Declaration du Roi, 6 Mai 1733, No. I. Declaration du Roi, 6 Mai 1733, No. II. Theſe three declarations are concerning the regulations of notaries, who muſt be of great uſe in a province where ſo few people write and read: and have, by the civil law, a quaſi juriſdiction, as it is termed, or of record; and as their modes of making public acts in memoriam rei, in reſpect to contracts, correſpond with ſo much of the French civil law as is to be retained, theſe declarations deſerve to be looked into; and the regulations and authority of the teſtimony of notaries may be found to be proper to be confirmed in all caſes, where vivâ voce evidence upon public trials is not required. So that to their acts and ſeals, as inſtrumental evidence, (to uſe their ſtyle) *full faith may be given in judgment and thereout*, being, by the civil law, equal to the evidence of two witneſſes.

Decla-

Declarations du Roi, du December 1, 1741, 1 Fevrier 1743, concerning minors, and the manner of appointment of guardians of their perſons and curators of their eſtates: excepting the propoſed alteration of the age of majority.

Arrêt du conſeil du Roi, 6 Juillet 1711, concerning the grants of lands to the ſeigneurs by the crown, and of the ſeigneurs to the inhabitants of their ſeignories under them, à titre de redevance, or fixed reſerved rents, when the inhabitants ſhall demand lands to be granted to them.

It will be extremely right to ſee the Reglement du Roi, 12 January 1717, concerning the ſittings of the admiralty court.

Ordonnance du Roi, du 23 Decembre 1721, concerning the deſertion of ſeamen.

Arrêt du conſeil d'etat du Roi, concerning the regulation of the rights and dues of the officers of the admiralty.

Decla-

Declaration du Roi, 6 Mai 1733, which eſtabliſhes the rules for the form of and depoſiting deeds of marriage ſettlements in Canada.

Reglement du Roi, du 9 Juin 1723, which regulates what is to be obſerved concerning the grants of ſeats in the churches of Canada.

Arrêt du conſeil Souverain 20 Juin 1667, concerning the manner and proportion of tithes, de treize une, or one in thirteen; le droit de moulure, or tolls of mills; à la quatorzieme portion, or fourteenth. Eſtabliſſement de l'hôpital à Ville Marie, (otherwiſe Montreal) by letters patent of the King, 16 April 1694.

Arrêt du conſeil d'etat du Roi, du 16 Mars 1732, concerning the ſale of woods ſtanding.

THE END.

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